In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, et al.,
Petitioners,

vs.

APOLINAR NAVARETTE, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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The petitioners, Raymond K. Procunier, et al., respectfully pray that a writ of certiorari issue to review the judgment and majority opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 9, 1976.

OPINION BELOW

The opinion of the Court of Appeals, holding prison officials to be liable in money damages under the Civil Rights Act (42 U.S.C. §1983) for mere negligent con-

duct, is reported at 536 F.2d 277 and is attached hereto as Appendix A.

JURISDICTION

The Court of Appeals order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc,* attached hereto as Appendix B, was filed on July 29, 1976. This petition is timely filed within 90 days of that date (28 U.S.C. §2101(c)).

This Court's jurisdiction is invoked under Title 28, United States Code section 1254(1). The district court's jurisdiction was invoked under Title 28, United States Code sections 1331 and 1343.

QUESTIONS PRESENTED

1. Whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?

2. Whether removal of a prisoner as a prison law librarian and termination of a law student-inmate visitation program in which he participated states a cause of action under the Civil Rights Act for either knowingly or negligently interfering with the prisoner's right of access to the courts?

3. Whether deliberate refusal to mail certain of a prisoner's correspondence in 1971-1972 prior to *Procunier v. Martinez,* 416 U.S. 396 (1974), and refusal to send certain correspondence by registered mail

states a cause of action for violation of his First Amendment right to free expression?

STATEMENT OF THE CASE

The litigation below is a pleading nightmare. The second-amended complaint to which the order below is addressed is actually the fourth complaint filed in this action.

On August 14, 1972, plaintiff Navarette, *pro se,* filed the original complaint herein, which was never served on the defendants. This initial action was denominated *Navarette v. Buwalda, et al.,* No. C-72-1259 SW, and was dismissed without prejudice on April 27, 1973.

The second *pro se* complaint—actually the first amended complaint—was filed on October 30, 1972, and was given a different case number, C-72-1954 SW (CT 1-11). That complaint was dismissed without prejudice by order filed February 9, 1973 (CT 192).

With the aid of counsel, a third complaint was filed in open court on April 27, 1973 (CT 193). Navarette had dropped one defendant *(i.e.,* May Buwalda) and added several others *(i.e.,* Procunier and Does I through IV). In response to defendants' motion to dismiss, filed May 25, 1973 (CT 35) the third complaint was withdrawn on July 27, 1973, upon stipulation of counsel that plaintiff file yet another amended complaint in lieu thereof (CT 72-74).

The fourth complaint—the second-amended complaint—was filed January 4, 1974 (CT 90-105). It alleges nine causes of action solely for damages under Title 42, United States Code section 1983.[1] This is the complaint that was acted upon by the district court and the Court of Appeals and which is before this Court on the instant petition. Defendants on February 21, 1974, filed their motions for summary judgment or dismissal (CT 106-162). On May 3, 1974, the district court filed its order granting summary judgment in favor of defendants as to causes of action one, two and three, and dismissing causes of action four through nine, inclusive, for failure to state a federal claim (CT 187). The judgment was filed on June 7, 1974 (CT 189).

Notice of Appeal was filed on June 4, 1974 (CT 188).

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[1]In claims one and two, Navarette alleged in substance that all defendants, in 1971-1972, deliberately refused to mail certain of his letters and refused to send certain other letters in violation of the First Amendment. Claim three alleges that the same actions were done negligently.

Navarette alleged that some 13 items of his mail were not delivered during 1971-1972 (CT 92-94). Prison mail records which were not disputed disclosed that more than 150 items of his correspondence were mailed to attorneys, friends, courts, legislators and other public officials during the same period (CT 121-136).

In claims four and five, Navarette alleges in substance that he was removed as a prison law librarian and that a law student-inmate visitation program in which he participated was deliberately terminated by defendants Procunier, Stone, and Morris, solely to hamper his legal activities. Claim six alleges that the same action was taken in negligent disregard of his legal activities.

In claims seven, eight, and nine, Navarette realleges the substance of counts one through six against defendants Procunier, Stone, and Morris, upon a theory of *respondeat superior*, not personal liability.

The Court of Appeals filed an opinion on February 9, 1976, reversing the order granting summary judgment as to claims one through three, reversing the order dismissing claims four through six and affirming the dismissal of claims seven, eight and nine. Also affirmed was the dismissal of all nine claims for failing sufficiently to allege a conspiracy. One judge dissented from the dismissal of counts four and five.

On February 23, 1976, defendants filed a petition for rehearing and suggestion for rehearing *en banc*. On July 29, 1976, the Court of Appeals filed its order denying the petition for rehearing and rehearing *en banc*. One member of the panel voted to grant panel rehearing and recommended that *en banc* rehearing be granted.

The mandate of the Court of Appeals has been stayed pending certiorari.

REASONS FOR GRANTING THE WRIT

1. California prison officials seek certiorari to determine whether they may be held liable for money damages for mere negligent conduct in the course of their official duties.

Authorities in the circuit courts appear divided. A number require an allegation of wrongful intent, bad faith or oppressive motive. *E.g., Williams v. Vincent,* 508 F.2d 541, 546 (2nd Cir. 1974). Others require only an allegation of recklessness or gross or culpable negligence. *E.g., Jenkins v. Averett,* 424 F.2d 1228, 1231-1232 (4th Cir. 1970). Simple negligence

has not sufficed in the absence of some allegation of knowing or conscious disregard of constitutional rights. The decision of the Court of Appeals herein is the first case to hold that simple negligence in the handling of outgoing prisoner mail states a cause of action under section 1983. The instant decision is in direct conflict with a decision of the Seventh Circuit upholding a district court ruling that simple negligence in the handling of mail does not state a 1983 claim. We refer to *Jenkins v. Meyers,* 338 F.Supp. 383, 389-390 (N.D.Ill.E.D. 1972) affirmed 481 F.2d 1406 (7th Cir. 1973); *also see, Church v. Hegstrom,* 416 F.2d 449, 450-451 (2nd Cir. 1969); *Kent v. Prasse,* 385 F.2d 406 (3rd Cir. 1967).

More significantly, subsequent to the Court of Appeals' decision herein, a majority of this Court rather clearly indicated that negligence did not state a cause of action under the Civil Rights Act. *Paul v. Davis,* 44 U.S. Law Week 4337, 4339 (1976). The majority observed that section 1983 did not serve to make all torts of state officials cognizable in a federal court. *Id.* Indeed, even the dissenting justices in *Paul v. Davis* agreed that section 1983 applied only to "an official's abuse of his position" (quoting *Monroe v. Pape,* 365 U.S. 167, 172 (1961)), and declined to state whether negligence could, under any circumstances, constitute such abuse; the gravamen of "abuse" being intentional conduct.

Under the Court of Appeals' decision, the burden on the federal judiciary of having to bring to trial all such ordinary negligence tort actions under section 1983, regardless of the frivolity of the allegations, could well be staggering. In this regard, it is noted that this Court on February 23, 1976, granted certiorari in *Estelle v. Gamble,* No. 75-929, [516 F.2d 937 (5th Cir. 1975)] wherein the Court of Appeals held that an inmate's claim that he was given improper, impliedly negligent, medical treatment for a back injury, stated a 1983 cause of action. We urge that the issues presented here are sufficiently similar to that in *Gamble* to justify *certiorari* and consolidation for purposes of argument and decision.

2. A 2-1 majority of the Court of Appeals held that Navarette's claims that his removal as a prison law librarian and the termination of a student visitation program in which he participated stated a section 1983 cause of action for interfering with his right of access to the courts. Subsequently, however, this Court in substance has held that removal of a state prisoner from his post of inmate law librarian and his transfer to another prison was an action entirely within the discretion of prison officials, not a matter of constitutional dimension. *Montayne v. Haymes,* 44 U.S. Law Week 5051 (1976). Moreover, as the dissent below points out, the termination of these two privileges, albeit hampering Navarette's opportunity to improve his legal acumen, is not sufficiently related to the right of access to the courts and does not involve a discriminatory denial of prison privileges generally available to other prisoners. Hence, the action taken fails to state a federal claim. *See, Hatfield v. Bailleaux,* 290 F.2d 632, 637, 641 (9th Cir.) *cert. denied sub nom.*

Bailleaux v. Hatfield, 368 U.S. 862 (1961). Certiorari is sought to correct this failure to follow *Montayne.*

3. Certiorari is also sought from the ruling that refusal in 1971-1972 to mail a prisoner's correspondence and to send it by registered mail state a federal claim for damages under the First Amendment.

Petitioners point out that it has not found any case, nor does the Court of Appeals cite any case holding that a prison inmate has a federal constitutional right to send his letters by registered mail.[2] Hence, we respectfully request that certiorari be granted to make it clear that the refusal to permit registered mailing does not state a federal claim under the First Amendment.

The alleged refusal by petitioners to mail certain of plaintiff's letters took place in 1971 and 1972, long before the decisions in the Ninth Circuit holding that prisoners had a right to correspond protected by the First Amendment. *See, Martinez v. Procunier,* 354 F.Supp. 1092, 1097 (N.D.Cal. 1973); *McKinney v. DeBord,* 507 F.2d 501, 505 (9th Cir. 1974). Moreover, this Court expressly declined to hold that inmates had such a right. *Procunier v. Martinez,* 416 U.S. 396, 408 (1974).

It is submitted that proper federal-state relations would require the lower federal courts to refrain from interfering with the discretionary action of state of-

[2]Neither did petitioners' mail regulations allow inmates to send letters by registered mail, except with permission of the warden (CT 145). Thus, any alleged denial thereof to plaintiff by subordinate employees (CT 94:22) does not implicate the equal protection clause.

ficials unless such action offends federal standards announced by the Supreme Court. *See, Rizzo v. Goode,* 44 U.S. Law Week 4095 (1976); *cf., Schneckloth v. Bustamonte,* 413 U.S. 218, 249 (1973). *A fortiori,* where the actions complained of not only fail to implicate a federal right declared by the Supreme Court, but also pre-date the articulation of such a right by the lower courts in this circuit, it is difficult to perceive wherein a federal cause of action can be said to have existed. A prison official "is not charged with predicting the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 557 (1967).

ARGUMENT

We do not present extended argument at this time as to our second and third reasons for the writ. The alleged access to courts claim is persuasively challenged by the dissenting opinion below and requires no repetition. Neither do we elect to belabor our contention that *Procunier v. Martinez* is not retroactive.

Extended discussion below is presented as to our first reason for granting the writ: negligence does not state a cause of action under the Civil Rights Act.

I

NEGLIGENCE IS NOT A PROPER BASIS FOR RELIEF UNDER THE CIVIL RIGHTS ACT

Section 1983 uses the term "deprivation" to describe the wrongdoing which generates liability. A deprivation is an act which dispossesses another of what is

his. In *Monroe v. Pape,* 365 U.S. 167 (1961), the act of deprivation was committed by a group of Chicago police officers who allegedly broke into the plaintiff's home, conducted an abusive and pervasive search and arrested and detained an occupant without cause. Such intentional torts as assault, battery, false imprisonment, invasion of privacy and inflicting of mental distress are implicated, not negligence. *See* Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 Ind.L.J. 5 (1974); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond,* 60 N.W.U.L.Rev. 277 (1965). In *Pierson v. Ray,* 386 U.S. 547 (1967), the act of deprivation was the alleged illegal arrest and imprisonment of assembled clergymen in Jackson, Mississippi, also intentional conduct.

Here, Navarette merely urges in claims three and six that prison officials negligently interfered with his mail and negligently took away certain privileges. The Court of Appeals holds he has therefore sufficiently alleged a "negligent" violation of a constitutional right. We respectfully submit that this ruling has neither historical nor judicial support.

A. The Historical Genesis of the Civil Rights Act Does Not Posit Liability for Negligence.

When the Civil Rights Act is viewed as a whole, and in the context in which it was passed, it is clear that only one specific type of negligence (which is inapplicable herein) was considered actionable. When the civil rights bill (H.R. 320, 42d Cong., 1st Sess. [1871]) was introduced, it did not contain any reference to negligence. Cong. Globe, 42d Cong., 1st Sess. 317 (1871). With minor amendments, the house bill was passed and sent to the Senate on April 6, 1871. It was reported out of committee with amendments on April 10, still without any reference to negligence. *See, id.,* at 567-578.

Subsequently, a joint conference committee was appointed to draft a provision suitable to both houses. The new section drafted by this committee, which became Section 6 of the Civil Rights Act of 1871 (17 Stat. 15), included for the first time a reference to negligence; creating liability in any person who, knowing that any of the acts forbidden under Section 2 (the conspiracy provision, 17 Stat. 13) were about to occur, "and having power to prevent or aid in preventing the same, shall *neglect* or refuse so to do. . . ." Cong. Globe 42d Cong., 1st Sess. 805 (1871) (emphasis added). This provision now appears as Title 42, United States Code section 1986. It is clear, then, that negligent liability was not included in the other provisions of the Act, and that the specific inclusion of negligence in what is now section 1986 was intentional and represented a new and different liability than that otherwise created.

This conclusion is buttressed by the historical context in which the Civil Rights Act arose. As observed in *Monroe v. Pape, supra,* 365 U.S. 167, 172-175 (1961), the Act was largely a response to the activities of the Ku Klux Klan, and the debates in Congress focused upon mob violence. The conduct for which the Act was to provide a remedy was intentional con-

duct—of the type classified as intentional torts. With the exception of that limited form of negligence specified in section 1986, there is nothing in the debates which would suggest that the Act embraced anything more than intentional torts.

B. The Judicial Decisions Have Not Posited Liability for Negligent Torts.

Monroe v. Pape, supra, 365 U.S. 167, 187 (1961), when considering the federal civil liability of police officers charged with an illegal search and arrest, stated in dictum that section 1983 should be read "against the background of tort liability mak[ing] a man responsible for the natural consequences of his acts." The section, of course, must also be read against its own background: "Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted." *District of Columbia v. Carter,* 409 U.S. 418, 425 (1973). Section 1983 speaks expressly neither of "intent" nor of "negligence".

The federal courts have not incorporated negligence concepts into the Civil Rights Act. Closest to the instant case is *Jenkins v. Meyers,* 338 F.Supp. 383 (N.D. Ill.E.D. 1972), aff'd, 481 F.2d 1406 (7th Cir. 1973). The prisoner in *Jenkins* sought injunctive relief and damages against prison officials for negligently failing to mail a trial transcript causing the prisoner to lose a court case. The action was dismissed, the court stating (338 F.Supp. at 389):

> "[T]here is a deprivation of a constitutional right but the act bringing about that violation was an unconscious one, a pure mistake, and the factual

> as well as the legal result were unintended. Thus, not only was there an absence of both improper motive and specific intent—there was no motive and no intent whatsoever since the defendant was not cognizant that the act was taking place no less the legal implications of that act."

The court also stated (338 F.Supp. at 390) that a different result would convert "every minor mistake, especially in the milieu of the prison, into a violation of section 1983. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable." *Also see Weathers v. Ebert,* 505 F.2d 514, 516-517 (4th Cir. 1974); *Davis v. Quarter Sessions Ct.,* 361 F.Supp. 720, 722 (E.D.Pa. 1973); *Beishir v. Schanzmeyer,* 315 F.Supp. 519, 520 (W.D.Mo. 1969).

In *Church v. Hegstrom,* 416 F.2d 449 (2nd Cir. 1969), the plaintiff alleged negligent denial of medical care. The Second Circuit held that ". . . § 1983 likewise does not authorize federal courts to interfere in the ordinary medical practices or other matters of internal discipline of state prisons" and "[m]ere negligence in giving or failing to supply medical attention alone will not suffice, since all rights existing under state law are not also federal rights carrying a federal remedy" (416 F.2d at 450-451). *See also Page v. Sharpe,* 487 F.2d 567, 569 (1st Cir. 1973); *Goode v. Hartman,* 388 F.Supp. 541, 542 (E.D. Va. 1975); *Wilbron v. Hutto,* 509 F.2d 621 (8th Cir. 1975); *Fear v. Pennsylvania,* 413 F.2d 88, 89 (3rd Cir. 1969), *cert. denied,* 396 U.S. 935 (1969); *United*

States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84, 87 (3rd Cir. 1969), *cert. denied,* 396 U.S. 1046 (1970); *Hopkins v. County of Cook,* 305 F. Supp. 1011, 1012 (N.D.Ill. 1969); *Kent v. Prasse,* 265 F.Supp. 673 (W.D.Pa. 1967), *aff'd,* 385 F.2d 406 (3rd Cir. 1967). Similarly, in *Bolden v. Mandel,* 385 F. Supp. 761, 763 (D.Md. 1974), the court said: "[T]here is no constitutional right of a prisoner to be free of simple negligence, particularly where the injury caused does not involve physical harm." *Also see, Johnson v. Glick,* 481 F.2d 1028, 1033 (2nd Cir. 1973).

Courts have used various terminologies to describe the acts of deprivation by the defendant which, though not strictly intentional, will make him accountable. Some courts speak of "gross and culpable negligence." *Jenkins v. Averett,* 424 F.2d 1228, 1231-1232 (4th Cir. 1970); *Rundle v. Madigan,* 356 F. Supp. 1048, 1052-1054 (N.D.Cal. 1972). Some courts speak of "evil intent," "recklessness" or "unreasonable, deliberate indifference". *See, Roberts v. Williams,* 456 F.2d 819, 828 (5th Cir. 1971), *cert. denied,* 404 U.S. 866 (1971), *modified,* 456 F.2d 834 (1972). An example of the latter is an inmate suit alleging that a guard did not protect him from an assault. *Williams v. Vincent,* 508 F.2d 541 (2nd Cir. 1974). The court stated at page 546:

> "In the same way, an isolated omission to act by a state prison guard does not support a claim under section 1983 absent circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control and dependent upon him. [Footnote omitted.]" *Also see, Williams v. Field,* 416 F.2d 483 (9th Cir. 1969).

These cases do not conflict with the general proposition that suits under section 1983 are not intended to redress instances of common law negligence and that there is no right to recovery from the inadvertent invasion of a constitutional right. *See, Paul v. Davis, supra,* 44 U.S. Law Week at 4339. An omission does not create a constitutional deprivation over which the court has jurisdiction. Cases where exceptions have been made invariably involve Eighth Amendment claims. Navarette's complaint does not allege any such special circumstances for a departure from the general rule.

C. The Cases Cited by the Court Do Not Support Its Ruling.

The Court of Appeals cites a string of cases (page 7, note 4) for the proposition that the courts of nearly every circuit have recognized that allegations of negligence state a cause of action for damages under the civil rights acts. These cases require some amplification. None involves a mail dispute or facts similar to the instant case. With one exception,[3] the cases listed involve allegations either of assault, false arrest or other misuse of force and typically required more than simple negligence to find a federal claim stated.

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[3] *McCray v. State of Maryland,* 456 F.2d 1, 5-6 (4th Cir. 1972). There, a claim against a court clerk for negligence in impeding the filing of a writ was held to sufficiently allege a cause of action for denial of access to the courts. *McCray* is thus in direct conflict not only with *Jenkins v. Meyers, supra* [338 F.Supp. 383, *aff'd,* 481 F.2d 1406], but also with *Davis v. Quarter Sessions Ct., supra* [361 F.Supp. 720]. In *Davis,* the court held that a court clerk's alleged negligent failure to furnish a prisoner with a copy of his criminal trial transcript did not state a 1983 claim.

For example, the Court cites *Jenkins v. Averett,* 424 F.2d 1228 (4th Cir. 1970), to support its ruling that negligence states a 1983 cause of action. The *Jenkins* case was an appeal from the findings of the trial court following a trial at which the defendant, a police officer, was found liable for assault and battery under a pendent state claim; a claim under section 1983 was rejected. The Fourth Circuit, one judge dissenting, found that the federal claim should have been considered in that the trial court's finding of "reckless use of force" or "gross or culpable conduct" supplied the intent necessary for federal purposes as well (424 F.2d at 1232). The court, however, stated (424 F.2d at 1232):

> "Our concern here is with the abuse of power by a police officer—as found by the District Judge —and not with simple negligence on the part of a policeman or any other official."

The Court of Appeals also directs attention to *Whirl v. Kern,* 407 F.2d 781 (5th Cir. 1969), *cert. denied,* 396 U.S. 901 (1969) and *Roberts v. Williams, supra,* 456 F.2d 819 (5th Cir. 1971), *cert. denied,* 404 U.S. 866 (1971), *modified,* 456 F.2d 834 (1972). These cases are each procedurally and factually distinct from the instant case.

Whirl involved a former prisoner's suit under section 1983 and pendent state claims against the sheriff for over-extending by nine months "the hospitality of his hostelry and the pleasure of his cuisine" (407 F.2d at 785). The claim was false imprisonment, an intentional tort. The jury was given negligence in-

structions. The jury found that the sheriff was not negligent. On appeal, the prisoner argued that he was entitled to a directed verdict as a matter of law. The court, *inter alia,* found that the sheriff's "good faith" was not a defense to a civil rights action for false imprisonment; that the sheriff was on constructive notice of the illegal confinement after the passage of an unreasonable period of time; that the case should not have been submitted to the jury on the basis of negligence since the prisoner was entitled to a directed verdict.

In the *Roberts* case, *supra,* the plaintiff alleged that he was shot on a prison farm by a trustee guard and a 1983 action was brought alleging cruel and unusual punishment and a pendent claim for negligence under state tort law. The trial court found the superintendent of the farm, Arterbury, liable under both federal and state law. The appellate court found that although the plaintiff alleged but did not prove that the injury was purposely inflicted, the superintendent's "demonstrated indifference to prisoner's safety," established a cruel state of mind with which physical harm and causation provided the basis of Eighth Amendment tort liability (456 F.2d at 838). *Roberts,* however, was subsequently modified (456 F.2d at 835): "We modify our opinion so as to declare that the liability of the defendant, Arterbury, rests upon Mississippi law applied under the doctrine of pendent jurisdiction."

The Court of Appeals also cites *Carter v. Carlson,* 447 F.2d 358 (D.C. Cir. 1971). *Carter* in *dicta* stated

that a police chief and a precinct captain may be held liable under section 1983 if (1) the plaintiff can prove they were negligent in the supervision and training of the police officer who assaulted the plaintiff, and (2) this negligence caused plaintiff to be deprived of a constitutional right. *Carter,* of course, was reversed by the United States Supreme Court, *District of Columbia v. Carter, supra,* 409 U.S. 418 (1973), which held that the District of Columbia was not a state or territory within the meaning of 42 United States Code section 1983. In *Carter,* the Supreme Court declared: "[W]e intimate no view on the merits of respondent's claims insofar as they are based on other theories of liability" (409 U.S. at 418). If negligent conduct were embraced by the Civil Rights Act then this specific reservation would have been unnecessary.

Finally, we would respectfully urge that proper federal-state relations mandate that the lower federal courts desist from imposing negligence liability on state officials in the absence of a decision of the United States Supreme Court clearly imposing such liability. *See, Rizzo v. Goode, supra; cf. Schneckloth v. Bustamonte, supra; United States ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075-1076 (7th Cir. 1970) *cert. denied,* 402 U.S. 983 (1971). Prison officials must retain the "necessary discretion" to experiment "without being subject to unduly crippling constitutional impediments." *Wolff v. McDonnell,* 418 U.S. 539, 566-567 (1974). If a lower federal court feels compelled to announce a landmark decision in federal

law, it should initiate its broadcase on the ground of a federal prison and leave the states to the supervision of their own courts and the United States Supreme Court.

Most significantly, the Court of Appeals' decision is squarely at loggerheads with the strong suggestion of this Court in *Paul v. Davis, supra,* that negligence does not state a cause of action under section 1983.[4]

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant a writ of certiorari and reverse the decision of the court of appeals.

Dated, September 27, 1976.

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[4]Under California Penal Code section 2601(e), state prisoners are able to bring civil suits in state courts.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 74-2212

APOLINAR NAVARETTE, JR., aka PAUL MEDEL NAVARETTE,
Plaintiff-Appellant,

vs.

RAYMOND K. PROCUNIER, T. W. STONE, P. J. MORRIS, B. NEAL, R. KRAMER, W. L. JOHNSON, and Does One through Four,
Defendants-Appellees.

Appeal from the United States District Court for
the Northern District of California

OPINION

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and HILL,* District Judge.

KOELSCH, Circuit Judge:

Appellant Navarette, a California state prisoner, brought this civil rights action against state prison officials under 42 U.S.C. §§1983, 1985 and 28 U.S.C. §§1341, 1343; his complaint set out nine purported

*The Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

claims. The district court granted summary judgment for appellees as to the first, second, and third and dismissed the fourth through ninth for failure to state a federal claim. We affirm in part and reverse in part.

The district court erred in its grant of summary judgment. As to claims one and two, Navarette's allegations in substance were that appellees deliberately refused to mail certain of his letters and to send certain others by registered mail in violation of the federal constitution and the mail regulations then in effect.

The controlling standard, first enunciated by the Supreme Court in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), is that an action may be dismissed for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Although the amended complaint drafted by Navarette's attorney is badly worded and is not entitled to application of the "less stringent" standards reserved for *pro se* pleadings (*Haines v. Kerner*, 404 U.S. 519, 520 (1972)), we nevertheless view the allegations as sufficient to state a claim for the violation of a first amendment right to free expression.

In *Martinez v. Procunier*, 354 F. Supp. 1092 (N.D. Cal. 1973), a case involving the censorship of prisoners' mail pursuant to state prison regulations, a three-judge district court enjoined enforcement of those regulations, holding "that prisoners' right to correspond is a fundamental right protected by the First Amendment, and that restrictions on that right must

be at least reasonably and necessarily related to a valid institutional interest . . . ." 354 F. Supp. at 1097. Reviewing that decision in *Procunier v. Martinez*, 416 U.S. 396 (1973), the Supreme Court affirmed on the narrower basis that unjustified governmental interference with the intended communications violated the first amendment rights, not of the prisoners, but of the non-prisoner correspondents who were party to those intended communications; the Court specifically reserved the question to what extent "an individual's right to free speech survives incarceration . . . ." 416 U.S. at 408.

Nevertheless, this court has indicated in at least two recent decisions that a prisoner does not shed his first amendment right to free expression upon entering the prison gates. *See McKinney v. DeBord,* 507 F.2d 501, 505 (9th Cir. 1974) (opin. of Choy, J.); *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, 480 F.2d 1062, 1065 (9th Cir. 1973). Relying on the language in these decisions and our essential agreement with the rationale of the three-judge court in *Martinez*, we think Navarette's allegations, although inartfully worded, permit proof entitling him to relief.[1]

However, the district court's grant of summary judgment would have been appropriate if there were

[1]We express no opinion as to whether Navarette's allegations of mail interference may state a claim for deprivation of his right to counsel or of access to the courts, *see Ex parte Hull*, 312 U.S. 546, 548-549 (1941); *Christman v. Skinner*, 468 F.2d 723 (2d Cir. 1972); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); of his right to equal protection of the laws, *see Smith v. Schneckloth*, 414 F.2d 680, 681 (9th Cir. 1969); or of his fourth amendment rights, *see United States v. Savage*, 482 F.2d 1371, 1373 (9th Cir. 1973). *Cf. Wolff v. McDonnell*, 418 U.S. 539, 575-577 (1974).

no genuine issue of any material fact or, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant were clearly entitled to prevail as a matter of law. *Stansifer v. Chrysler Motors Corporation*, 487 F.2d 59, 63 (9th Cir. 1973).

In that regard, appellees argue that summary judgment was proper on the ground that a reasonable and good faith belief of a state official that his or her conduct is lawful, even where in fact it is not, constitutes a complete defense to a §1983 claim for damages.

True, the existence of a public officer's "good faith" immunity from §1983 liability has been recognized in a number of situations. *See Wood v. Strickland*, ... U.S. ....., 43 U.S.L.W. 4293 (Feb. 25, 1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951). *See also Williams v. Gould*, 486 F.2d 547, 548 (9th Cir. 1973); *Handverger v Harvill*, 479 F.2d 513, 516 (9th Cir. 1973); *Wimberley v. Campoy*, 446 F.2d 895, 896 (9th Cir. 1971); *Notaras v. Ramon*, 383 F.2d 403, 404 (9th Cir. 1967). But here appellees' assertions that they acted in the good faith belief that they were complying with valid regulations are contradicted by Navarette's affidavits. This raised an issue of fact and precluded summary judgment. *See Wimberley, supra*, 446 F.2d at 896.[2] More-

[2]The existence or lack of good faith—a state of mind which is therefore a subjective fact—generally is not the type of issue that lends itself to resolution, on the basis of affidavits, by summary judgment.

over, the district court may not assume that the defense of good faith is always available. In *Williams v. Gould*, 486 F.2d 547, 548 (9th Cir. 1973), we said that "[g]ood faith is a defense to liability for damages in a suit under section 1983—at least if, and to the extent that, it would be a defense '[u]nder the prevailing view in this country' in common-law actions based on the parallel tort [*citing Pierson v. Ray*, 386 U.S. 547, 555 (1967)]." And in *Wood v. Strickland, supra*, the Supreme Court concluded that § 1983 should be construed to accord school board members a qualified good faith immunity from damages under that section where "common-law tradition" and "strong public-policy reasons" so dictate. Slip-op. at 12. On remand, the district court should determine whether the defense of good faith is available in this action in respect of causes one and two.

The dismissal of claims four and five was error. The substance of those claims was that Navarette was removed as prison librarian and a law-student visitation program in which he participated was terminated solely to punish or hamper his legal activities. The termination or denial of prison privileges because of a prisoner's legal activities on his own behalf or those of other inmates is an impermissible interference with his or her constitutional right of access to the courts. *See Hooks v. Kelley*, 463 F.2d 1210, 1211 (5th Cir. 1972); *Christman v. Skinner*, 468 F.2d 723, 726-727 (2d Cir. 1972). Hence the allegations concerning the removal of Navarette as librarian constituted a

valid claim. Similarly, the termination of the law-student visitation program may well have had the effect of impermissibly burdening Navarette's right of access to the courts. *See Younger v. Gilmore,* 404 U.S. 15 (1971), *affirming Gilmore v. Lynch,* 319 F. Supp. 105 (N.D. Cal. 1970); *Procunier v. Martinez, supra,* 416 U.S. at 419-422; *Johnson v. Avery,* 393 U.S. 483 (1969); *Ex parte Hull,* 312 U.S. 546 (1941).[3]

The district court also erred in granting summary judgment as to the third claim and in dismissing the sixth. The allegations in claim three are to the effect that the acts charged in claims one and two were committed negligently; and such was also the gravamen of the sixth with respect to the acts charged in claims four and five.

In *Williams v. Field,* 416 F.2d 483, 485 (9th Cir. 1969), *cert. denied,* 397 U.S. 1016 (1970), we recognized that it was still an open question in this circuit whether a negligent act can give rise to § 1983 liability. Since then, we have twice noted the issue without deciding it. *See Allison v. Wilson,* 434 F.2d 646, 647 (9th Cir. 1970), *cert. denied,* 404 U.S. 863 (1971); *Cockrum v. Whitney,* 479 F.2d 84, 86 n.1 (9th Cir. 1973).

Section 1983 creates a federal cause of action against "[e]very person who, under color of any stat-

[3]We need not consider whether the alleged termination of the librarianship or the law-student visitation program might constitute a sufficiently significant invasion of Navarette's liberty or property interests requiring the procedural safeguards outlined in *Clutchette v. Procunier,* 497 F.2d 809, 510 F.2d 613 (9th Cir. 1974).

ute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." The section places no narrow limitation on the nature or quality of the conduct which it makes actionable, but concerns itself entirely with the consequences of that conduct. Moreover, the Court indicated in *Monroe v. Pape,* 365 U.S. 167, 187 (1961) that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Reading the statute in the prescribed fashion, we believe that a deprivation of rights need not be purposeful to be actionable under § 1983. *Cf. Cohen v. Norris,* 300 F.2d 24 (9th Cir. 1962) (in banc).[4]

[4]Other circuits are in essential agreement. *See, e.g., Hoitt v. Vitek,* 497 F.2d 598, 602 n.4 (1st Cir. 1974); *Howell v. Cataldi,* 464 F.2d 272, 279 (3d Cir. 1972); *McCray v. Maryland,* 456 F.2d 1, 5-6 (4th Cir. 1972); *Jenkins v. Averett,* 424 F.2d 1228, 1232-1233 (4th Cir. 1970); *Parker v. McKeithen,* 488 F.2d 553, 556 (5th Cir. 1974), *cert. denied,* 419 U.S. 838 (1974); *Roberts v. Williams,* 456 F.2d 819 (5th Cir. 1971), *cert. denied,* 404 U.S. 866 (1971); *Whirl v. Kern,* 407 F.2d 781, 787-789 (5th Cir. 1969), *cert. denied,* 396 U.S. 901 (1969); *Fitzke v. Shappell,* 468 F.2d 1072, 1077 (6th Cir. 1972); *Puckett v. Cox,* 456 F.2d 233, 234-235 (6th Cir. 1972); *Spence v. Staras,* 507 F.2d 554, 557 (7th Cir. 1974); *Byrd v. Brishke,* 466 F.2d 6, 10-11 (7th Cir. 1972); *Joseph v. Rowlen,* 402 F.2d 367, 369-370 (7th Cir. 1968); *Dewell v. Lawson,* 489 F.2d 877, 881-882 (10th Cir. 1974); *Daniels v. Van De Venter,* 382 F.2d 29, 31 (10th Cir. 1967); *Stringer v. Dilger,* 313 F.2d 536, 540-541 (10th Cir. 1963); *Carter v. Carlson,* 447 F.2d 358, 365 (D.C. Cir. 1971), *reversed on other grounds,* 409 U.S. 418 (1973). *But cf. Brown v. United States,* 486 F.2d 284, 287-288 (8th Cir. 1973).

Of course we do not imply that all tortious conduct engaged in by a public official acting under color of state law is subject to redress under § 1983. A § 1983 plaintiff must show that he has been deprived of a federally protected right by reason of that conduct. In the specific context involved here—the administration of state prison systems—federal courts have traditionally been loathe to intervene absent unusual circumstances,[5] and hence the extent to which many federal rights held by ordinary citizens survive incarceration is as yet uncertain. *Cf. Wolff v. McDonnell,* 418 U.S. 539, 555-556 (1974). Nevertheless, here the prisoner's rights which Navarette alleges to have been violated are fundamental and reasonably well-defined; his allegations that state officers negligently deprived him of those rights state a § 1983 cause of action.[6]

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[5]This circuit, like others, *see e.g., Parker v. McKeithen,* 488 F.2d 553, 556 (5th Cir. 1974); *Sostre v. McGinnis,* 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972), has traditionally been reluctant to interfere in matters of state prison administration. *See Williams v. Field, supra,* 416 F.2d at 485. *See, e.g., Mayfield v. Craven,* 433 F.2d 873 (9th Cir. 1970); *Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969); *Stiltner v. Rhay,* 371 F.2d 420 (9th Cir. 1967), *cert. denied,* 387 U.S. 925, 389 U.S. 964 (1967); *Snow v. Gladden,* 338 F.2d 999 (9th Cir. 1964); *Weller v. Dickson,* 314 F.2d 598 (9th Cir. 1963), *cert. denied,* 373 U.S. 930 (1963). *But see Riley v. Rhay,* 407 F.2d 496 (9th Cir. 1969).

Nevertheless, as noted in *Parker v. McKeithen, supra,* 488 F.2d at 556, "it can no longer be correctly asserted that the federal courts are unwilling in all situations to review the actions of state prison administrators to determine the existence of possible violations of constitutional rights." In this context, *see Wolff v. McDonnell,* 418 U.S. 539 (1974), at 555-556 (opinion of the Court) and 593-601 (Douglas, J., dissenting in part).

[6]Summary judgment as to the third cause of action was improper because, as in the case of counts one and two, viewing the evidence in the light most favorable to Navarette, we are unable to say appellees are entitled to prevail as a matter of law.

The district court did not err in dismissing claims seven, eight, and nine. In them, Navarette sought to predicate the liability of defendants Procunier, Stone, and Morris, not on a theory of personal liability, but rather on the doctrine of *respondeat superior.* This court has recognized that, in appropriate circumstances, the Civil Rights Act does contemplate the imposition of vicarious liability where such liability is authorized by state law. *See Hesselgesser v. Reilly,* 440 F.2d 901, 903 (9th Cir. 1971); 42 U.S.C. § 1988. *See also Hansen v. May,* 502 F.2d 728, 730 (9th Cir. 1974); *Boettger v. Moore,* 483 F.2d 86, 87 (9th Cir. 1973). But here the State of California specifically precludes the imposition of such liability by statute. *See* Cal. Gov. Code § 820.8.[7] *Cf.* the Supreme Court's reading of *Hesselgesser* in *Moor v. County of Alameda,* 411 U.S. 693, 704 n.17 (1973).

All nine claims, so far as they purported to be predicated upon 42 U.S.C. § 1985, were properly dismissed. Navarette's pleadings and affidavits failed sufficiently to allege the existence of the conspiracy contemplated by that section. *See, e.g., Griffin v. Breckenridge,* 403 U.S. 88, 102-103 (1971); *Sykes v. State of California,* 497 F.2d 197, 200 (9th Cir. 1974); *Granville v. Hunt,* 411 F.2d 9, 11 (5th Cir. 1969).

Affirmed in part, reversed in part, and remanded.

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[7]The "Legislative Committee Comment—Senate," which follows §820.8, provides in part:

"This section nullifies the holdings of a few old cases that some public officers are *vicariously liable* for the torts of their subordinates." (Emphasis in original.)

HILL, District Judge, concurring in part and dissenting in part.

I concur in the majority opinion except as it relates to the Fourth and Fifth Claims. I would affirm the trial court's dismissal of those causes of action for failure to state a federal claim. I cannot agree either with the characterization of those claims as contained in the majority opinion or with the statements of law made by the majority concerning them. Since the two causes of action allege the same acts in identical language, both will be hereinafter referred to as "the claim".[1]

The majority opinion asserts that the substance of the claim is that Navarette was removed as prison librarian, and that the Stanford law student visitation program in which he participated was terminated, "solely to punish or hamper his legal activities." I submit that this is not a correct statement of the substance of the claim. I quote in full the operative paragraphs of the complaint in the footnote.[2]

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[1]The majority treat the Fourth and Fifth Causes of Action as involving the same legal questions and I agree that they should be so treated. Both claims allege exactly the same actions in identical language except that the Fourth Claim characterizes the actions as having been "deliberately perpetrated . . . in a knowing disregard of plaintiff's constitutional rights . . ." and in the Fifth Claim as being undertaken "in bad faith disregard of plaintiff's constitutional rights . . . [defendants' lacking] probable cause to believe that plaintiff's legal activities thereby interfered with were unprotected . . ." by the U.S. Constitution.

[2]"II

For approximately three months during the fall of 1971, plaintiff held the position of prison law librarian at Soledad, during which time his heightened access to library facilities enabled plaintiff, in addition to fully performing his duties as librarian, to pursue his own legal self-education, and as a consequence, to

The claim begins by alleging that plaintiff held the position of prison law librarian for three months during the fall of 1971. It says that the position was advantageous to him because the increased access to library facilities enabled him to "pursue his own legal self-education" and, in consequence thereof, to prepare writs and pleadings in 12 different cases for himself and others. Late in *1971*, the complaint says, plain-

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prepare semi-adequate writs and pleadings in approximately twelve different cases, on behalf of himself and others.

"III

Starting on or about February, 1972, a small number of Stanford law students, all of whom were acredited for supervised practice, were permitted by the Department of Corrections to visit inmates at Soledad for the purpose of discussing the legal needs and problems of such inmates. Said law students at all times conducted themselves reasonably in connection with such interviews and in no respect abused the privileges under said program. The legal advise and assistance which Plaintiff received as a result of such law students interviews had begun significantly to educate plaintiff, and, as a consequence thereof, to facilitate greatly the large number of legal actions, including the within action, which Plaintiff had been seeking to bring in order to obtain judicial relief both for himself and others.

"IV

Late in 1971, defend*n*ats STONE and MORRIS, both individually and in concert together, abruptly changed plaintiff's job position, and as a proximate result thereof, plaintiff's access to legal books and materials in said library was substantially curtailed. Moreover, in fall, 1972, said defendants, both individually and in concert together, also terminated the visitation program described in the immediately pre*c*eding paragraph, and, as a proximate result thereof, thereby thwarted plaintiff's efforts to acquire an adequate fund of legal knowledge in respect to the legal remedies available to himself and others. In direct consequence of both actions by said defendants as described in the within paragraph, plaintiff was prevented from pursuing in adequate and timely manner, available legal remedies on behalf of himself and others.

"V

Defendants STONE and MORRIS deliberately perpetrated the actions hereinabove described for the purpose of thwarting and impeding plaintiff's acquisition of knowledge of available legal remedies, and did so in knowing disregard of plaintiff's constitutional rights."

tiff's position was "abruptly" taken from him. No separate statement of the defendants' alleged intent or purpose in taking the librarian position away from the plaintiff is made.

The claim then goes on to describe the Stanford law student visitation program and its termination. This act is obviously not related in time to the removal of plaintiff as law librarian. The complaint says that the student visitation program commenced in *February 1972* and was terminated in fall of that year. Plaintiff says that he benefitted from the program because the advice and assistance he received from the students "had begun significantly to educate" him "and thus to facilitate greatly the large number of legal actions" which he had been seeking to bring for himself and others. The termination of the program as alleged was obviously a total termination of it for the entire prison; no other fair reading of the complaint is possible. Again, the claim contains no separate statement of defendants' alleged intent or purpose in terminating the program. Its termination, said plaintiff, "thwarted" his efforts "*to acquire an adequate fund of legal knowledge* in respect to the legal remedies available to himself and others." (Emphasis supplied). Because the termination impeded his self-education, plaintiff says he was "prevented" from pursuing "in adequate and timely manner" available legal remedies on behalf of himself and others.

In characterizing the intent or purpose of defendants' acts, paragraph V sweeps both apparently unrelated acts together and charges that they were

undertaken for the purpose of "thwarting and preventing" plaintiff's acquisition of "knowledge of available remedies . . . ."

What plaintiff has alleged, at most, is that he was discontinued as prison librarian, and the student visitation program was discontinued in the institution, because plaintiff was becoming such a good lawyer and for the purpose of preventing him from becoming a better one.

The majority opinion reads the complaint as making a claim of interference with plaintiff's right of access to the courts. I do not believe it can be fairly so read. In paragraph VI, plaintiff describes the constitutional rights of which he has been deprived by the acts complained of. He includes free speech and due process. But he makes no claim whatever of denial of access to the courts.[3]

The right of access to the courts has been defined by this court as follows:

> ". . . access to the court means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in

[3]It should be borne in mind that this plaintiff is no ordinary prisoner pro per litigation. His pleading is both sophisticated and polished. His choice of language would do credit to a top-level private practitioner specializing in civil rights litigation. The pleading indicates a more than adequate knowledge of constitutional law, particularly the Civil Rights Act, and an awareness of the essential elements of different theories of law which can be used, in different counts, to attack the same actions. Plaintiff's claim in paragraph II of having been working on 12 different cases during the period in question seems credible indeed. So this plaintiff is not entitled to the special advantages afforded to semi-literate unknowledgeable prisoners in scanning their pleadings although, in my view, the result would be the same if he were afforded that advantage.

order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communiications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux,* 290 F.2d 632, 637 (9th Cir.) *cert. den. sub nom Bailleaux v. Hatfield,* 368 U.S. 862 (1961)

The cases establish that the right of access to the courts includes more than the right to prepare, file and prosecute legal actions.

It has also been said that the right of access to the courts ". . . encompass all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore v. Lynch,* 319 F.Supp. 105 (N.D.Cal. 1970) [3-judge court], *aff'd sub nom Younger v. Gilmore,* 404 U.S. 15 (1971).

Among the other related rights which have been held to be necessarily involved in the right of access to the courts are: the right to seek and receive the assistance of lawyers (*Procunier v. Martinez,* 416 U.S. 396 (1974)), the right to the assistance of knowledgeable inmates (*Johnson v. Avery,* 393 U.S. 483 (1969)), and the right of access to a reasonably good set of lawbooks *(Gilmore v. Lynch, supra).* Each of those corollary rights made a part of the general right of access is necessarily and directly related to the prosecution of legal actions. The majority opinion here seems to extend the right of access to the courts to the alleged right to a better legal education, the alleged right to continue as prison law librarian and

the alleged right to continuation of a law student visitor program. I cannot agree that any of these rights are so necessarily and directly related to the general right of access to the courts that they should be made a part thereof. As to the alleged right to become a better lawyer, to pursue a legal education, this court has specifically said in *Hatfield v. Bailleaux, supra,*

> "Inmates have the constitutional right to waive counsel and act as their own lawyers but this does not mean that a non-lawyer must be given the opportunity to acquire a legal education." 290 F.2d at 641.

The statement in the majority opinion that "the termination or denial of prison privileges because of a prisoner's legal activities is an impermissible interference with his or her constitutional right of access to the courts" is unfortunate in two separate respects. First, it equates the indefinite concept of "legal activities" with the right of access to the courts. The term "legal activities" could encompass legal studies unrelated to any specific case or it could encompass the filing and prosecution of an action or it could encompass various activities in between. The term is much too vague and too broad. As stated, I would define access to the courts in the language which this court has previously used in *Hatfield v. Bailleaux,* quoted *supra.* Secondly, it extends the right of access to the courts to activities which are not reasonably related thereto, as aforesaid.

The remainder of my dissent is directed to the following sentence in the majority opinion:

> "The termination or denial of prison privileges because of a prisoner's legal activities is an impermissible interference with his or her constitutional right of access to the courts."

I believe that to be much too broad a statement and one which is not supported by the cases cited. *Hooks v. Kelley,* 463 F.2d 1210 (5th Cir. 1972), is a holding by the Fifth Circuit court that a complaint states a § 1983 claim which charges that the petitioner has been transferred from minimum security to medium security status only because of his persistent use of the courts to attack his conviction and to attack prison conditions. This case involves no termination or denial of a privilege. It involves an attempt to punish or discourage access to the courts by imposing more onerous conditions of incarceration.

Christman v. Skinner, 468 F.2d 273 (2nd Cir. 1972), is a holding by the Second Circuit that a § 1983 claim is sufficient which charged that plaintiff was prohibited from associating with fellow inmates and was denied gym facilities on an equal basis with other inmates because of, and in retaliation for his commencement of court litigation against prison officials. This case does involve a privilege but involves the *discriminatory denial* thereof because the prisoner instituted court law suits. A case much like *Christman* is *Andrade v. Hauck,* 452 F.2d 1071 (5th Cir. 1971). It holds that a § 1983 complaint is sufficient which charges that a prisoner was deprived of commissary privileges as punishment for corresponding with the courts. Again, a privilege generally available to all inmates was denied or terminated in a discriminatory manner as punishment for undertaking court actions.

I believe that a more precise statement of the governing rule is that redress is affordable under §1983 for the *discriminatory* termination or denial of prison privileges generally available to all inmates, undertaken *because* of the prisoner's exercise of his right of access to the courts. This requirement of discriminatory action is specifically recognized in two cases dealing with prisoners' freedom of religion. *Sostre v. McGinnis,* 442 F.2d 178, 189 (2nd Cir. 1971), *cert. den. sub nom Sostre v. Oswald,* 404 U.S. 1049 (1971), 405 U.S. 978 (1972); *Cooper v. Pate,* 378 U.S. 546 (1964), and, in my view, should also be applied to the right of access.

If I have correctly stated the rule of law, the instant case does not fall within it because the face of the complaint shows no discriminatory denial of privileges. No cause of action is stated even if it be assumed that the acts charged were done solely to get at the plaintiff because he was filing so many cases. But, so to read the complaint would be a forced and unreal reading of it.

In the instant case, the student visitation program was cancelled for the entire prison. There was no discrimination against this particular plaintiff involved. It must be conceded that the prison authorities had the discretion to initiate the program and retained the discretion to terminate it at will. In my view, when the non-discriminatory termination of a

prisonwide privilege is alleged, it does not support a complaint under §1983.

As to plaintiff's position as prison librarian, it would again have to be conceded that we are again dealing with a prison privilege. Neither the plaintiff nor any other prisoner has a constitutional right either to be selected as prison librarian, or to remain in that position once selected. Only one prisoner at a time may be the law librarian. Surely the prison authorities retain the right to rotate the position among inmates—they may even have the duty to do so. They would also appear to have the right to discontinue the position entirely. If a given prisoner is not selected for the position, or once given the job is replaced in it by another prisoner, he is not thereby denied a privilege generally available to others. Thus, I would hold that the instant complaint concerning plaintiff's removal from the position does not state a cause of action under §1983.

I would not require prison authorities to undergo the trial of a court action for the termination of either privilege, first, because neither action is sufficiently related to the right of access to the courts, and, even if it is, neither act involves the discriminatory denial of a prison privilege generally available to other inmates.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 74-2212

Apolinar Navarette, Jr., aka Paul Medel Navarette,
Plaintiff-Appellant,
vs.
Jiro J. Enomoto,* T. W. Stone, P. J. Morris, B. Neal, R. Kramer, W. L. Johnson, and Does One through Four,
Defendants-Appellees.

[Filed Jul. 29, 1976]

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and HILL,** District Judge.

Order Denying Petition for Rehearing
and Rejecting Suggestion for Rehearing In Banc

Judges Koelsch and Hufstedler voted to deny the petition for panel rehearing and to recommend against

*During the pendency of this appeal, the appellee Raymond K. Procunier, as Director of the Department of Corrections of the State of California, was succeeded in that office by Jiro J. Enomoto. To reflect this change, the said Jiro J. Enomoto is substituted as one of the appellees in this action, and the caption of the proceeding is amended accordingly.

**The Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

a rehearing in banc. Judge Hill voted to grant the panel rehearing and recommended that the in banc rehearing be granted.

The full court having been duly advised and no judge of the court in active service having requested a vote on the suggestion for rehearing in banc (F. R. App. P. 35(b)), the petition for rehearing is denied, and the suggestion for rehearing in banc is rejected.

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, et al.,
Petitioners,

vs.

APOLINAR NAVARETTE, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Certiorari Filed September 28, 1976
Certiorari Granted January 17, 1977

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APPENDIX

In the Supreme Court
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Petition for Certiorari Filed September 28, 1976
Certiorari Granted January 17, 1977

Subject Index[1]

[1]The opinion of the Court of Appeals filed February 9, 1976, may be found in Appendix A to the petition for certiorari.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 30, 1972—Plaintiff Navarette's *pro se* Complaint for Damages filed in the United States District Court for the Northern District of California.

December 21, 1972—Defendants' Motion to Dismiss filed.

February 2, 1973—Plaintiff's Points and Authorities in Opposition to Motion to Dismiss filed.

February 9, 1973—Order filed dismissing complaint without prejudice.

April 27, 1973—With aid of counsel, Plaintiff's Amended Complaint filed.

May 25, 1973—Defendants' Motion to Dismiss or for Summary Judgment filed.

January 19, 1974—With aid of Counsel, Plaintiff's Second Amended Complaint filed.[2]

February 21, 1974—Defendants' Motion to Dismiss or for Summary Judgment filed.

April 17, 1974—Plaintiff's Points and Authorities Against Motion to Dismiss filed.

May 3, 1974—Order granting Summary Judgment as to claims 1, 2, 3, and dismissing claims 4, 5, 6, 7, 8 and 9 filed.

June 4, 1974—Notice of Appeal filed by plaintiff.

June 10, 1974—Judgment entered.

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[2]The First Amended Complaint was withdrawn on July 27, 1973 (CT 72-74). The docket does not reflect this action.

June 26, 1974—Cause docketed in United States Court of Appeals for the Ninth Circuit.

August 15, 1974—Appellant Navarette's opening brief filed.

September 13, 1974—Appellees' brief filed.

October 8, 1974—Appellant's reply brief filed.

February 13, 1975—Cause submitted on briefs.

February 9, 1976—Opinions of the Court of Appeals filed.

March 3, 1976—Appellees' Petition for Rehearing and Suggestion for Rehearing en banc filed.

March 30, 1976—Appellees' letter dated March 29, 1976, re *Paul v. Davis* received.

July 29, 1976—Order denying rehearing and rejecting suggestion for rehearing en banc filed.

August 5, 1976—Order Staying Mandate filed.

August 9, 1976—Appellees' letter dated August 5, 1976, re *Montayne v. Haymes,* received.

September 28, 1976—Petition for Writ of Certiorari filed.

January 17, 1977—Order granting Petition for Writ of Certiorari filed.

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1660 East Santa Clara Street
San Jose, California 95116
Telephone: 926-2525
Attorney for Plaintiff.

The United States District Court
Northern District of California

No. C-72-1954 SW

Apolinar Navarette, Jr.,
aka Paul Medel Navarette,
Plaintiff,

vs.

Raymond K. Procunier, T. W. Stone, P. J. Morris, B. Neal, R. Kramer, W. L. Johnson and Does I through IV,
Defendants.

SECOND AMENDED COMPLAINT FOR DEPRIVATION OF CIVIL RIGHTS

Comes now Plaintiff Apolinar Navarette, Jr., aka Paul Medel Navarette, and alleges as follows for Causes of Action against Defendants and each of them;

First Cause of Action

I

Plaintiff is a citizen of the State of California, and a resident of this judicial district.

II

Defendants Procunier, Stone, Morris, Neal, Kramer, Johnson, and Does I, II, III and IV are all citizens of the State of California.

III

The matter in controversy exceeds Fifty Thousand Dollars ($50,000.00) exclusive of interest and costs.

IV

This action arises under Title 42 of the United States Code, Sections 1983 and 1985, and this court has jurisdiction of the action under Title 28 of the United States Code, Sections 1331 and 1343.

V

At all times pertinent to this Complaint, Defendant Procunier was Director of the California State Department of Corrections (hereinafter "Department of Corrections") and was responsible for promulgating and maintaining statewide departmental regulations regarding the rights and privileges of prisoners at penal facilities under the authority of the department; Defendant Stone was employed by the Department of Corrections as Superintendent of the Soledad Correctional Training Facility (hereinafter "Soledad"),

and was responsible for implementation of all applicable laws and regulations at Soledad; Defendant Morris was employed by the Department of Corrections as Associate Superintendent of Soledad, and was responsible for assisting in implementation of all applicable laws and regulations at Soledad; Defendants Neal and Kramer were employed by the Department of Corrections as correctional counselors at Soledad, and were responsible for supervising certain prisoners, including Plaintiff; Defendant Johnson was employed by the Department of Corrections as a member of the prison staff at Soledad, and was in charge of handling incoming and outgoing prisoner mail.

VI

Plaintiff was incarcerated at Soledad from approximately September 1, 1971 to approximately December 11, 1972, at which time Plaintiff was put on parole. Plaintiff will not be discharged from parole until approximately October 24, 1975.

VII

Defendants Neal, Kramer, Johnson and Does I through IV, acting both individually and jointly together, failed to mail a considerable amount of correspondence which Plaintiff properly submitted to them for mailing during the period of this incarceration at Soledad. The various pieces of such correspondence dealt with legal, political and personal matters. None of such correspondence threatened, contemplated, or included plans for any criminal activity whatsoever; none threatened or posed any

clear and present danger of physical harm or violence to any person; none was obscene; none was written in any form of code. Said unmailed correspondonce includes but is not limited to the following:

(1) A packet mailed by Plaintiff on or about December 9, 1971, to the Prison Law Project in Oakland, California, containing the only copy then in Plaintiff's possession of his draft of a Writ of Habeas Corpus which Plaintiff intended to file shortly thereafter. The Prison Law Project never received this packet.

(2) A letter which Plaintiff posed between mid-December, 1971 and mid-January, 1972, to Mariano Gonzales, an inmate incarcerated at Sierra Conservation Center in California (hereinafter "Sierra"). The letter requested that Gonzales immediately return to Plaintiff the copy of Plaintiff's abovementioned Writ of Habeas Corpus which Gonzales had in his possession. Gonzales never received the letter.

(3) Two letters which Plaintiff posted on January 16 and 18, 1972, respectively, to Henry Navarro, an inmate incarcerated at Sierra. The letters requested a copy of a different Writ of Habeas Corpus which Navarro had in his possession to assist Plaintiff in redrafting his own Writ, but also requested a copy of a motion to waive appeal bond which Navarro had in his possession so that Plaintiff could assist a fellow inmate at Soledad in preparing an appeal. Navarro never received the letter.

(4) Two letters which Plaintiff posted, respectively, during January, 1972, and February, 1972,

to Robert Manriquez. The letters asked Manriquez to send Plaintiff the citations to certain judicial decisions, and some money needed by Plaintiff to pursue his legal actions. Manriquez received neither letter.

(5) A letter whch Plaintiff posted on or about January 2, 1972, to Rita Serna, secretary to Ceasar Chavez, requesting help and support for Plaintiff's Writ of Habeas Corpus. Serna never received the letter.

(6) A letter to La Casa Legal de San Jose Project, during or about February, 1972, enclosing Plaintiff's drafts of a civil complaint dealing with the matters herein involved, and seeking legal representation from this agency;

(7) Three letters which Plaintiff posted, respectively, on or about February 20, 1972, February 21, 1973, and April 30, 1972, to Teresa Gonzales, the wife of Mariano Gonzales, who was an inmate at Sierra. Said letters were written to further Plaintiff's efforts to assist Mariano Gonzales in pursuing legal remedies. The letters were not received.

(8) Letter posted by Plaintiff, during late September, 1972, or thereabouts, to Steve Sonora, a law student, requesting follow-up assistance in regard to Plaintiff's Writ of Habeas Corpus filed in March, 1972. Sonora never received the letters.

(9) Eight packets, each containing a copy of a letter from Plaintiff to Roger Cortez dated May 6, 1972 and a copy of a letter from Plaintiff to a court clerk dated June 8, 1972, which Plaintiff posted on

or about May 8, 1972 to the following eight addresses: Roger Cortez, a Chicano student group, five Chicano newspapers, and a television station. The letter to Cortez referred, inter alia, to their political struggle against the injustice and prejudice meted out to Mexican-Americans. The letter to the court clerk expressed Plaintiff's frustration at the allegedly systematic unresponsiveness of the clerk's office to Plaintiff's requests and inquiries arising from preparation of his Writ of Habeas Corpus. Based upon a decision by Defendant Kramer and some or all of the other Defendants, all eight packets were returned unmailed to Plaintiff.

(10) Two letters posted by Plaintiff on May 14, 1972, and July 6, 1972, respectively, to Miss Jesse Serna, each containing personal messages and enclosing application forms for Miss Serna to apply for status as an approved correspondent with Plaintiff. Miss Serna received neither letter.

(11) A letter to Tom Burke, a Stanford law student, on or about September, 1971, in which Plaintiff requested legal help in regard to my own Writs of Habeas Corpus as well as a Writ which Plaintiff was preparing on behalf of another inmate;

(12) A letter to David Squazell, a Stanford law student on or about November, 1971, in which Plaintiff requested legal help in connection with the same Writs;

(13) A letter to Victor Reyes, chairman of a Law Project at the University of Santa Clara, on or about

March, 1972, enclosing drafts of the same civil complaint, and seeking legal assistance in regard thereto.

VIII

Defendants, Neal, Kramer, Johnson and Does I through IV, and each of them, acting both individually and in concert, refused to send as registered mail numerous items of correspondence of legal character which Plaintiff duly presented to said Defendants for posting. As a proximate result of such refusals, none of said letters were ever received by addressees. The foregoing letters include but are not limited to items (1), (6), (11), (12), and (13) specified in Paragraph VII hereinabove.

IX

Correspondence described in Paragraphs VII and VIII hereinabove failed to reach the addressees to whom destined as a proximate result of interference or confiscation by Defendants Neal, Kramer, Johnson and Does I through IV, and each of them, acting both individually and in a concert of action wherein each said Defendant acquiesced, condoned, encouraged, and assisted the actions of each other in a deliberate effort to single out Plaintiff for harsh, arbitrary, and discriminatory treatment with regard to his correspondence, in knowing disregard of applicable statewide prisoner mail regulations then in effect as set forth in the Director's Mail and Visiting Manual for the Department of Corrections, including rules 1201, 1205 (D) and (F), 12401 and 12402(8)

therein (hereinafter "Statewide Manual"). Said correspondence was in fact permitted by the aforesaid mail regulations.

X

Defendants Procunier, Stone, and Morris encouraged, directed, ratified and knowingly acquiesced in the actions of Defendants Neal, Kramer, Johnson and Does I through IV as described in Paragraphs VII through IX hereinabove, and did so both individually and in pursuance of a common plan or design, deliberately singling out Plaintiff for harsh, arbitrary, and discriminatory treatment with regard to his correspondence, in knowing disregard of the fact that Plaintiff's constitutional rights were thereby violated.

XI

The above described actions by Defendants, and each of them, deprived Plaintiff of his civil rights, including his rights to free speech and due process, as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution, and by Title 42 of the United States Code, Sections 1983 and 1985. Said actions have caused actual damage to Plaintiff in the amount of Ten Thousand Dollars ($10,000.00), and, due to their aggravated, callous, and malicious character, as well as to the critically important character of the rights herein infringed upon further entitle Plaintiff to punitive damages in the amount of Ninety Thousand Dollars ($90,000.00).

Second Cause of Action

I

Plaintiff herein realleges and incorporates by reference Paragraphs I through VIII of the First Cause of Action in this Complaint, and each and every allegation contained in such Paragraphs, as though fully set forth herein.

II

Such correspondence failed to reach the persons to whom destined as the proximate result of interference or confiscation of said Correspondence by Defendants Neal, Kramer, Johnson, and Does I through IV, and each of them, acting both individually and in concert, in bad faith disregard of the prisoner mail regulations then in effect as embodied in the Statewide Manual, and in each such act of confiscation of or interference with Plaintiff's correspondence, said Defendants lacked probable cause to belief that such correspondence was in violation of said prisoner mail regulations. Said correspondence was in fact permitted by said mail regulations.

III

Defendants Procunier, Stone, and Morris encouraged, directed, ratified, participated, and knowingly acquiesced in the actions of Defendants Neal, Kramer, Johnson, and Does I through IV as described in Paragraph II hereinabove, and did so in bad faith disregard of Plaintiff's constitutional rights, and without probable cause to believe that such correspondence exceeded the bounds of constitutional protection en-

joyed by Defendant. As a proximate result thereof, said correspondence failed to reach the persons to whom destined.

IV

Plaintiff herein realleges and incorporates by reference Paragraph XI of the First Cause of Actions of this Complaint, and each and every allegation contained therein, as though fully set forth herein.

Third Cause of Action

I

Plaintiff herein realleges and incorporates by reference Paragraphs I through VIII of the First Cause of Action in this Complaint, and each and every allegation contained in said Paragraphs, as though fully set forth herein.

II

Such correspondence failed to reach the persons to whom destined as the proximate result of interference with or confiscation of such correspondence by Defendants Neal, Kramer, Johnson, and Does I through IV, and each of them, acting both individually and in concert. In so acting, Defendants negligently and inadvertently misapplied the prisoner mail regulations then in effect as embodied in the Statewide Manual. Such correspondence was in fact permitted by the aforesaid mail regulations.

III

Such correspondence failed to reach the persons to whom destined as the proximate result of the negli-

gent failure of Defendants Procunier, Stone, and Morris to furnish Defendants Neal, Kramer, Johnson, and Does I through IV with sufficient training and direction on how to evaluate prisoner correspondence, including that of Plaintiff, to avert the unreasonable risk of interference with or confiscation of correspondence which in fact is constitutionally protected.

IV

Plaintiff herein realleges and incorporates by reference Paragraph XI of the First Cause of Action of this Complaint, and each and every allegation contained herein as though fully set forth.

Fourth Cause of Action

I

Plaintiff herein realleges and incorporates by reference Paragraphs I through VI, inclusive of the First Cause of Action of this Complaint, and each and every allegation contained in such Paragraphs as though fully set forth herein.

II

For approximately three months during fall of 1971, plaintiff held the position of prison law librarian at Soledad, during which time his heightened access to library facilities enabled plaintiff, in addition to fully performing his duties as librarian, to pursue his own legal self-education, and as a consequence, to prepare semi-adequate writs and pleadings in approximately twelve different cases, on behalf of himself and others.

III

Starting on or about February, 1972, a small number of Stanford law students, all of whom were accredited for supervised practice, were permitted by the Department of Corrections to visit inmates at Soledad for the purpose of discussing the legal needs and problems of such inmates. Said law students at all times conducted themselves reasonably in connection with such interviews and in no respect abused the privileges under said program. The legal advice and assistance which Plaintiff received as a result of such law students interviews had begun significantly to educate plaintiff, and, as a consequence thereof, to facilitate greatly the large number of legal actions, including the within action, which Plaintiff had been seeking to bring in order to obtain judicial relief both for himself and others.

IV

Late in 1971, defendants Stone and Morris, both individually and in concert together, abruptly changed plaintiff's job position, and as a proximate result thereof, plaintiff's access to legal books and materials in said library was substantially curtailed. Moreover, in fall, 1972, said defendants, both individually and in concert together, also terminated the visitation program described in the immediately preceeding paragraph, and, as a proximate result thereof, thereby thwarted plaintiff's efforts to acquire an adequate fund of legal knowledge in respect to the legal remedies available to himself and others. In direct conse-

quence of both actions by said defendants as described in the within paragraph, plaintiff was prevented from pursuing in adequate and timely manner, available legal remedies on behalf of himself and others.

V

Defendants Stone and Morris deliberately perpetrated the actions hereinabove described for the purpose of thwarting and impeding plaintiff's acquisition of knowledge of available legal remedies, and did so in knowing disregard of plaintiff's constitutional rights.

VI

Defendant Procunier encouraged, directed, ratified, and knowingly acquiesced in the actions of defendants Stone and Morris and did so in pursuance of a common plan or design to single out plaintiff for harsh and arbitrary treatment with regard to his legal activities, and with knowing disregard of plaintiff's constitutional rights.

VII

The above described actions by Defendants, and each of them, deprived Plaintiff of his civil rights, including his rights to free speech and due process, as guaranteed by the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and by Title 42 of the United States Code, Sections 1983 and 1985. Said actions have caused damage to Plaintiff in the amount of Ten Thousand Dollars ($10,000.00), and, due to their aggravated, callous, and malicious character, as well as to the critically

important character of the rights herein infringed upon, further entitle Plaintiff to punitive damages in the amount of Ninety Thousand Dollars ($90,000.00).

Fifth Cause of Action

I

Plaintiff herein realleges and incorporates by reference Paragraphs I through IV of the Fourth Cause of Action of this Complaint, and each and every allegation contained in such Paragraphs as though fully set forth herein.

II

Defendants Stone and Morris perpetrated the above described actions in bad faith disregard of plaintiff's constitutional rights. In each such action, said defendants lacked probable cause to believe that plaintiff's legal activities thereby interfered with were unprotected from such interference by the Constitution and Laws of the United States.

III

Defendant Procunier, encouraged, directed, ratified, participated, and knowingly acquiesced in the actions of defendants Stone and Morris as described herein above, and did so in bad faith disregard of plaintiff's constitutional rights, and without probable cause to believe that plaintiff's legal activities which were thereby impeded and thwarted were unprotected by the constitution and Laws of the United States.

IV

Plaintiff herein realleges and incorporates by reference Paragraph VII of the Fourth Cause of Action of this Complaint, and each and every allegation contained in such Paragraph though fully set forth herein.

Sixth Cause of Action

I

Plaintiff herein realleges and incorporates by reference Paragraphs I through IX of the Fourth Cause of Action of this Complaint, and each and every allegation contained in such Paragraphs as though fully set forth herein.

II

Defendants Stone and Morris, both individually and in concert together, perpetrated the aforementioned actions in negligent disregard of the risk thereby posed of unreasonable interference with legal activities of plaintiff which enjoy the protection of the Constitution and Laws of the United States.

III

Defendant Procunier permitted the aforementioned actions of Defendants Stone and Morris to transpire due to the negligent failure of Defendant Procunier to provide defendants Stone and Morris with sufficient training and direction on how to regulate the legal activities of prisoners consistently with the Constitution and Laws of the United States. Through said negligent failure, Defendant Procunier courted the

risk of unreasonable interference with and impeding of Plaintiff's protected legal activities.

IV

Plaintiff herein realleges and incorporates by reference Paragraph VII of the Fourth Cause of Action of this Complaint, and each and every allegation contained in such Paragraph as though fully set forth herein.

Seventh Cause of Action

I

Plaintiff herein realleges and incorporates by reference Paragraphs I through IX of the First Cause of Action of this Complaint, and each and every allegation contained in such Paragraphs as though fully set forth herein.

II

At all pertinent times, Defendants Neal, Kramer, Johnson and Does I through IV were the agents and employees of Defendants Procunier, Stone and Morris, and, in perpetrating the actions described hereinabove, acted within the scope of said agency and employment.

III

Plaintiff herein realleges and incorporates by reference Paragraphs I through V of the Fourth Cause of Action of this Complaint, and each and every allegation contained therein as though fully set forth herein.

IV

At all pertinent times, Defendants Stone and Morris were the agents and employees of Defendant Procunier, and, in perpetrating the actions described hereinabove, did act within the scope of said agency and employment.

V

Plaintiff herein realleges and incorporates by reference Paragraph XI of the First Cause of Action and Paragraph VII of the Fourth Cause of Action of this Complaint, and each and every allegation contained therein as though fully set forth herein.

Eighth Cause of Action

I

Plaintiff herein realleges and incorporates by reference Paragraphs I through VIII of the First Cause of Action and Paragraph II of the Second Cause of Action of this Complaint, and each and every allegation contained therein as though fully set forth herein.

II

At all pertinent times, Defendants Neal, Kramer, Johnson and Does I through IV were the agents and employees of Defendants Procunier, Stone and Morris, and in perpetrating the actions, described hereinabove, acted within the scope of said agency and employment.

III

Plaintiff herein realleges and incorporates by reference Paragraphs I through IV of the Fourth Cause of Action and Paragraph II of the Fifth Cause of Action of this Complaint, and each and every allegation contained therein as though fully set forth herein.

IV

At all pertinent times, Defendants Stone and Morris were the agents and employees of Defendant Procunier, and, in perpetrating the actions described hereinabove, did act within the scope of said agency and employment.

V

Plaintiff herein realleges and incorporates by reference Paragraph XI of the First Cause of Action and Paragraph VII of the Fourth Cause of Action of this Complaint, and each and every allegation contained therein as though fully set forth herein.

Ninth Cause of Action

I

Plaintiff herein realleges and incorporates by reference Paragraphs I through VIII, of the First Cause of Action and Paragraph II of the Third Cause of Action of this Complaint, and each and every allegation contained therein as though fully set forth herein.

II

At all pertinent times, Defendants Neal, Kramer, Johnson and Does I through IV were the agents and

employees of Defendants Procunier, Stone and Morris, and, in perpetrating the actions described hereinabove, acted within the scope of said agency and employment.

III

Plaintiff herein realleges and incorporates by reference Paragraphs I through IV, of the Fourth Cause of Action and Paragraph II of the Sixth Cause of Action of this Complaint, and each and every allegation contained therein as though fully set forth herein.

IV

At all pertinent times, Defendants Stone and Morris were the agents and employers of Defendant Procunier, in perpetrating the actions described hereinabove, did act within the scope of said agency and employment.

V

Plaintiff herein realleges and incorporates by reference Paragraph XI of the First Cause of Action and Paragraph VII of the Fourth Cause of Action of this Complaint, and each and every allegation contained therein as though fully set forth herein.

Wherefore, Plaintiff claims damages of the defendants, and each of them, in the amount of one hundred thousand dollars ($100,000.00).

Dated, ..., 1974.

Michael E. Adams
/s/ Michael E. Adams
Attorney for Plaintiff

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Misc. No. 76-445

RAYMOND K. PROCUNIER, et. al., Petitioners,

v.

APOLINAR NAVARETTE, JR., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Attorney for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Misc. No. 76-446

RAYMOND K. PROCUNIER, et. al., Petitioners,

v.

APOLINAR NAVARETTE, JR., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 536 F.2d 227.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the following actions, done in negligent disregard of a prisoner's substantive constitutional rights which were in fact curtailed by such actions, give rise to causes of action under Section 1983:

(a) Deliberate refusal to mail certain of a prisoner's

outgoing letters;

(b) Termination of a law student visitation program from which a prisoner obtains assistance in preparing legal actions;

(c) Removal of a prisoner as prison law librarian?

2. Whether removal of a prisoner as a prison law librarian and termination of a law student-inmate visitation from which he obtains assistance in preparing legal actions, done in knowing interference with his right of access to the courts, give rise to a cause of action under Section 1983?

3. Whether deliberate refusal to mail certain of a prisoner's outgoing letters in 1971-72 done in either knowing violation or negligent disregard of applicable court decisions but before Martinez v. Procunier, 354 F.Supp. 1092 (N.D. Cal. 1973) was decided, gives rise to a cause of action under Section 1983?

4. Whether deliberate refusal to send certain of a prisoner's outgoing letters by registered mail can give rise to a cause of action under Section 1983?

STATEMENT OF THE CASE

The court below ruled on a complaint by Navarette setting forth nine causes of action under Sections 1983 and 1985, and seeking relief in damages. This complaint had been several times amended, in that it was initially filed pro se by Navarette while a state prisoner and subsequently revised twice by within counsel after being retained by Navarette.

The complaint alleges three sets of facts from which relief is sought: deliberate interference with Navarette's outgoing mail; termination of Navarette's position as law librarian; and termination of a law student visitation program from which Navarette obtained legal assistance. The first through the sixth causes of action, upheld by the court below as to Section 1983, allege alternately with respect to these same sets of facts as to petitioners' actions that said actions were done either in knowing violation or in negligent disregard of Navarette's substantive constitutional rights as guaranteed by the First and Sixth Amendments.

ARGUMENT

I. THE DECISION BELOW DOES NOT ESTABLISH A NEWLY BROAD BASIS FOR RELIEF IN NEGLIGENCE

The court below upheld those of Navarette's causes of action which sound in negligence with this appropriately narrow language:

> "Of course we do not imply that all tortious conduct engaged in by a public official acting under color of state law is subject to redress under Section 1983. A Section 1983 plaintiff must show that he has been deprived of a federally protected right by reason of that conduct....here the prisoner's rights which Navarette alleges to have been violated are fundamental and reasonably well-defined..." (Petitioners' Appendix, p. viii)

The foregoing decision is thus squarely in accord with Paul v. Davis, ___U.S.___, 47 L.Ed.2d 405, 96 S.Ct.____, where this Court, in holding an interest in reputation to be insufficient for purposes of triggering Section 1983, noted: "Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded," 47 L.Ed.2d at 413. Herein the specific guarantees of the First and Sixth Amendments protect the activities by Navarette which Petitioners thwarted through their actions which were intentionally directed at his protected activities.

The court below is likewise in no conflict with other decisions cited by Petitioners. Jenkins v. Meyers, 338 F.Supp. 383, for example, struck down a Section 1983 claim because it involved merely the inadvertant mailing by prison officials of a prisoner's transcript to the wrong addressee instead of to the prisoner's attorney. The court therein urged that the state official should have intended the factual result of his actions before negligence be allowed as a basis for relief:

> " (Section 1983) is meant to apply only to conscious intended acts even under circumstances where there is a total innocence as to the constitutionally violative nature of the act and result (except where that innocence would be a common law tort defense such as good faith in false arrest cases)....The very language of Monroe v. Pape as to the responsibility of a man for the natural consequences of his actions implies some minimum degree of knowledge that the action is taking place." 338 F.Supp. at 390.

Since Petitioners herein concede that they deliberately intended the factual results of each of the actions from which Navarette seeks relief, the foregoing language is squarely in accord with the decision below. The same can be said for other decisions cited by Petitioners: Section 1983 claims sounding in negligence have generally been denied where the factual results were not

intended or strongly foreseeable, or where the injured interests could not be subsumed under substantive constitutional protections. Thus, in Beishir v. Schanzmeyer, 315 F. Supp. 519 (W.D.Mo. 1969), where no claim was deemed stated for the negligent failure by prison guards to make a list of the prisoner's confiscated property, his ensuing loss was not strongly foreseeable, and, in any case, involved merely a property interest. Likewise in Bonner v. Coughlin, No. 74-1422 (7 Cir. 10/76), cited by Petitioners in their supplemental letter to this Court dated 12/7/76, where no claim was deemed stated for the negligent failure by prison guards to secure a prisoner's cell door, thereby permitting theft of his court transcript, the identical analysis applies as in Beishir, supra.* Similarly in Kent v. Prasse, 385 F.2d 406 (3 Cir. 1967), where no claim was deemed stated by a prisoner injured because required by prison officials to work on a press known to be dangerous the tortious conduct lacked any aggravating factor, and the prisoner possessed only a property interest in his physical health.

Each of the foregoing decisions holding no claims to have been stated can thus be reconciled by the above criteria with the decision below. On the other hand, McCray v. State of Maryland, 456 F.2d 1 (4 Cir. 1972) does appear, as Petitioners assert, to conflict with the above criteria in holding a claim to be stated against a court clerk merely for negligence of the inadvertant character involved in Jenkins v. Meyers, supra. However, this apparent conflict does not involve the holding below, and hence is unpersuasive as a reason for granting certiorari herein.

Likewise unpersuasive as a reason for granting certiorari herein is the fact that certiorari has already been granted in Estelle v. Gamble, No. 75-929 (516 F.2d 937 (5 Cir. 1975)), wherein issues are raised about allegedly negligent medical treatment and unfounded solitary confinement. These Eighth Amendment-related issues pose difficulties in drawing a viable perimeter around actionable infringements of prisoner interests without importing the entire body of related tort claims. Standards for accomplishing this have been varied and loosely worded. Cf. Church v. Hegstrom, 416 F.2d 449 (2 Cir. 1969)(actionable failure to provide medical care must amount to "conduct that shocks the conscience" or a "barberous act"). Intervention by this Court to formulate a viable

*Consistently with the above criteria, Bonner/the "'fundamental and reasonably well-defined' constitutional rights" involved herein contrasted with the merely "generalized due process right" asserted therein (p. 8 of opinion supplied by Petitioners)

perimeter to Section 1983 claims in the Eighth Amendment area is thus much needed. In contrast, the First and Sixth Amendment areas involved herein protect conduct that does not interfere so broadly with multitudinous ordinary tort claims, and in any case have posed no untoward difficulties to the lower federal courts in setting perimeters to Section 1983 claims of infringement upon such expressly protected conduct.

II. THE RETALIATORY DENIAL OF A PRISONER'S PRIVILEGES GIVES RISE TO A CLAIM UNDER SECTION 1983

Petitioners claim that Montayne v. Haymes, ___U.S.___, 49 L.Ed 2d 466, 96 S.Ct.___, establishes that Navarette failed to state a federal claim for interference with his right of access to the courts through his removal as prison law librarian and the termination of the law student visitation program. However, in Montayne, supra, the removal of plaintiff therein as law librarian simply triggered a chain of events which culminated in transfer of that plaintiff to another prison, said transfer being the sole link to this chain which this Court found necessary to rule upon. That ruling, which concluded that procedural due process is not necessarily triggered by a nonpunitive transfer between prisons, did not reach the latent issue as to the reasons for removal of the plaintiff therein as librarian.

Herein, in contrast, the sole issue posed in this connection is whether a Section 1983 claim is raised by the deliberate withdrawal of Sixth Amendment-related privileges (both the librarianship and the student visitation) where the purpose, or at least the strongly foreseeable result, is a substantial curtailment of Navarette's pursuit of various legal actions. Such withdrawal of privileges need not, as Petitioners argue, be discriminatory to be actionable. Rather, the sine qua non is whether the withdrawal of such privileges is in reprisal for Navarette's persistent resort to the courts, or, put differently, done with an aim or expectation of curbing or hampering such legal actions. Cf. In re Harrell, 2 Cal.3d 675, 695 (1970); Hatfield v. Halleaux, 290 F.2d 632, 638 (9 Cir. 1961). This issue simply applies the broader precept that denial of "...a benefit to a person on a basis that infringes his Constitutionally protected interests" is subject to constitutional scrutiny lest "...his exercise of these freedoms would in effect be penalized and inhibited (citations)," Perry v. Sinderman, 408 U.S. 593, 597 (1972).

These Sixth Amendment-related claims by Navarette thus are clearly cognizable, and raise no problem calling for intervention

by this Court.

III. THE DECISION BELOW IS NOT UNFOUNDED BECAUSE THE ALLEGED MAIL INTERFERENCE ANTEDATED MARTINEZ V. PROCUNIER OR INCLUDED THE REFUSAL TO SEND CORRESPONDENCE BY REGISTERED MAIL

Petitioners claim that since the alleged mail interference occurred during 1971-72, prior to the decision in Martinez v. Procunier, 354 F.Supp. 1092 (1973) which expressly required the within prison officials to revise their treatment of prisoner mail to abide by First Amendment guarantees, Navarette's said allegations run afoul of the precept that a prison official "...is not charged with predicting the future course of constitutional law," Pierson v. Ray, 386 U.S. 547, 557 (1967). However, no evidence is recited in Pierson, supra, that the police therein involved had any judicial warning that the state law under which they made the questioned arrests was about to be overturned on constitutional grounds. Where such judicial warnings exist, such as through court rulings repeatedly striking down as unconstitutional other laws highly similar to the law being enforced, then the innocent state of mind of the enforcing official may indeed be subject to question. Cf. Anderson v. Nosser, 438 F.2d 183 (5 Cir. 1971)(reasonable fact issue raised as to whether defendant police officials were aware of the unconstitutionality of their parade ordinance, which conferred unbridled discretion to deny permits, in light of repeated prior court decisions invalidating similar parade ordinances). Thus herein Navarette argued to the court below that the existence, in 1971-72 of the already numerous federal decisions on First Amendment prisoner rights (fourteen such decisions are cited in Martinez v. Procunier, supra, 354 F.Supp. at 1096), as well as the decision in In re Harrell, 2 Cal.3d 675 (Calif. Sup. Ct. 1970), holding that prisoner regulations by the within prison officials generally should be tailored carefully to limit constitutional prisoner rights only insofar as justifiable by a strict balancing test, certainly sufficed to raise triable issues as to the culpable states of mind of Petitioners when they interfered with Navarette's mail.

Whether Navarette was constitutionally entitled to demand that certain of the correspondence herein involved be sent by registered mail in order to be assured that it reached its destination would seem to depend on an analysis of the appropriateness of the governing prison regulation and its manner of application. This issue should hence likewise be decided, at least in the first instance, at trial upon an airing of evidence as to the character of this regulation and the circumstances surrounding the demand that certain correspondence be registered.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

DATED: December 13, 1976

Respectfully submitted,

MICHAEL R. ADAMS
Attorney for Respondent

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, et al., *Petitioners,*

vs.

APOLINAR NAVARETTE, JR., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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In the Supreme Court
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears as Appendix A to the Petition for Writ of Certiorari and is reported at 536 F.2d 277.

JURISDICTION

The order of the Court of Appeals denying rehearing filed on July 29, 1976 appears as Appendix B to the petition. The Petition for Writ of Certiorari was timely filed, docketed in this Court on September 28, 1976, and granted on January 17, 1977.

The jurisdiction of this Court is conferred by Title 28, United States Code section 1254(1).

STATUTES INVOLVED[1]

Section 1983 of Title 42, United States Code provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress."

QUESTION PRESENTED

Whether negligent failure to mail certain of a prisoner's outgoing letters in 1971-1972, states a cause of action for damages under section 1983?

STATEMENT OF THE CASE

With the aid of counsel, Navarette filed a second-amended complaint on January 4, 1974 in the United States District Court for the Northern District of

[1]The text of other statutes or regulations cited in this brief appears in the attached appendix.

California (R 90, A 3).[2] This is the complaint that was acted upon by the district court and the Court of Appeals and which is before this Court. It alleges nine causes of action *solely for damages* under Title 42, United States Code section 1983.

In the complaint, Navarette, a state prisoner, alleged that the defendants[3] failed to mail thirteen of his letters in 1971 and 1972 (A 6-8)[4] and failed to

[2]This was actually the fourth complaint filed in this action. The litigation was begun on August 14, 1972, by the filing of a *pro se* complaint, *Navarette v. Buwalda, et al.*, No. C-72-1259 SW which was dismissed without prejudice on April 27, 1973.

A second *pro se* complaint, was filed on October 30, 1972, and was given a different case number, C-72-1954 SW (R 1-11). That complaint was dismissed by order filed February 9, 1973 (R 20, 192). This order dismissed plaintiff's mail interference claim insofar as it alleged interference with access to the courts (R 171). No appeal was taken from this order nor was this claim reasserted in the subsequent complaints. (R 34).

With the aid of counsel, a third complaint was filed on April 27, 1973 (R 193). In response to defendants' motion to dismiss, filed May 25, 1973 (R 35), the third complaint was withdrawn on July 27, 1973, upon agreement between counsel that plaintiff file yet another amended complaint (R 72-74).

[3]The defendants include three subordinate Soledad Prison correctional officers: Neal, Kramer and Johnson, who were responsible for monitoring mail. The other three defendants are supervisory prison officials: Director of the California Department of Corrections Procunier, Soledad Prison Warden Stone and Associate Warden Morris (A 4-5).

[4]Navarette's prison mail records disclose that more than 150 items of his correspondence were mailed to attorneys, friends, family, courts, legislators and other public officials during the same period (R 121-136). The accuracy of these records was not disputed. The records also show that as to allegedly unmailed items (2)-(5) and (7)-(13), the addresses were not on Navarette's approved correspondence list (R 121) and could well have been refused mailing for that reason alone (R 145: Regulation D2403). The records do show a number of specially permitted letters were mailed to the addressees named in items (8) (10) and (11) (R 131, 133). As to items (2)-(4), the addressees were prison inmates and the letters could well have been refused mailing for that additional reason (R 145: Regulation 2402(13)). Item

mail five of these letters by registered mail (A 9), thereby depriving him of his right of free speech (A 9-10). No denial of access to counsel or to the courts was alleged.[5]

In the third cause of action it is alleged that these acts were done "negligently"[6] and that three supervisory defendants were "negligent" in failing to furnish sufficient training to the subordinates regarding evaluation of prisoner mail (A 12-13).[7]

(6) concerns Navarette's letter to La Casa Legal de San Jose, about February 1972, enclosing drafts of his civil complaint in this action and requesting representation (R 93:9-12). The record shows that on February 2, 1972, La Casa attorneys filed a brief herein (R 22) and have since continuously represented Navarette. Item (1) remains as an alleged first amendment deprivation. (R 75, 84-85) solely based on negligence (R 87, 129).

[5]*See* footnote 2, *ante,* and footnote 8, *post.*

[6]In the first cause of action it is alleged that such acts were done "deliberately" and "in knowing disregard" of applicable prisoner mail regulations and of plaintiff's right of free speech (A 9-10). The second cause of action alleges that the same acts were done "in bad faith disregard" of such regulations and right (A 11). These two claims have been treated by the Court of Appeals as encompassing but one cause of action (App. Pet. ii).

[7]The fourth cause of action alleged that the supervisory defendants deliberately terminated a law student-inmate visitation program in which Navarette participated and removed him from his job as a prison law librarian solely to hamper his legal activities in knowing disregard of his constitutional rights of free speech and due process (A 13-16). No allegation of denial of access to counsel or the courts appears (A 15). The fifth claim alleges that the same acts were deliberately done in bad faith disregard of plaintiff's rights; the sixth claim alleges that the same acts were done in "negligent disregard" of plaintiff's legal activities (A 16-18).

In claims seven, eight and nine, Navarette realleges the substance of counts one through six against the three supervisory defendants, upon a theory of vicarious rather than personal liability (A 18-21). In addition, all nine claims purported to allege a conspiracy in violation of 42 U.S.C. § 1985. No injunctive or declaratory relief is sought. Navarette seeks only damages: $10,000.00 in actual damages and $90,000.00 in punitive damages as to each defendant on each cause of action (A 10, 15, 21).

On May 3, 1974, the district court filed its order granting summary judgment in favor of defendants on causes one, two, and three, and dismissing causes four through nine for failure to state a federal claim (R 187). Notice of appeal was filed on June 4, 1974 (R 188).

The Court of Appeals filed its opinion on February 9, 1976, holding that claims one and two stated a section 1983 cause of action for deliberate interference with a prisoner's first amendment right of free expression in his correspondence;[8] that claims four and five stated a section 1983 cause of action for deliberate interference with a prisoner's right of access to the courts;[9] and that claims three and six stated a section 1983 cause of action for negligent interference with the same rights (App. Pet. ii, vi, viii). It also held that the claims of liability based on *respondeat superior* (claims 7, 8, 9) did not state a section 1983 cause of action and that all nine claims failed sufficiently to allege a section 1985 conspiracy (App. Pet. ix).

As to Navarette's third claim, i.e., the negligent failure to mail his outgoing letters, the Court of Appeals found that section 1983 "places no narrow limitation on the nature or quality of the conduct which it makes actionable, but concerns itself entirely with the consequences of that conduct" [App. Pet.

[8]The Court of Appeals expressed no opinion whether Navarette's allegations of mail interference stated a claim for deprivation of his right to counsel or of access to the courts (App. Pet. iii, n. 1).

[9]One judge dissented on this point (App. Pet. x-xviii).

vii]. From this premise, the Court of Appeals held that if there has been a deprivation of a federally protected right by reason of tortious conduct engaged in by a state public official acting under color of state law, to be actionable under section 1983, that deprivation "need not be purposeful" (App. Pet. vii). Thus, the allegation in the third claim "that state officers negligently deprived him of those [mail] rights states a § 1983 cause of action." [App. Pet. viii.][10]

SUMMARY OF ARGUMENT

A public official's negligent conduct, is not an intentional deprivation of a constitutional right and therefore cannot be a basis for a cause of action under section 1983, for two reasons.

First, historically the Ku Klux [Klan] Act of 1871 was designed only to reach intentional conduct, including such unwillingness to act in the face of a known duty to do so, as would constitute deliberate indifference to the consequences of the failure to act. Second, this Court's decisions confine the modern interpretation of the act to precisely such conduct.

Section 1983 was enacted to provide a remedy for "an official's abuse of his position." *Monroe v. Pape,* 365 U.S. 167, 192 (1961). Abuse presupposes intentional conduct, not negligence. "[T]he survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle" are not thought to have a 1983 claim. *Paul v. Davis,* 424 U.S. 693, 698 (1976). Though the harmful consequences be identical, only when they result from intentional conduct, including "deliberate indifference", and not simply from negligence, is there a section 1983 cause of action. *Estelle v. Gamble,* ..... U.S. ....., 45 L.W. 4023, 4025-4026 (1976).

To add a negligence theory of 1983 liability to the already heavy flow of civil rights litigation would have a staggering impact on the federal courts. It would also subject thousands of state and local public officials to the burdens of jury trial and possible personal liability in damages. This is especially so when the intimate relationship of state prisoners and the state officers who supervise their confinement provides an infinite capacity for dispute and litigation. *See, Preiser v. Rodriguez,* 411 U.S. 475, 492 (1972).

In any event, Navarette suffered no constitutional deprivation in 1971 and 1972. This Court in 1974 expressly declined to create a first amendment right of a prisoner to correspond and recognized solely the right of the person outside prison to correspond with the inmate. *Procunier v. Martinez,* 416 U.S. 396, 408 (1974). Where the "right" asserted has not been recognized by this Court and especially where it has not even been articulated by the lower federal courts, no federal cause of action in damages exists. A prison

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[10]On February 23, 1976, defendants filed a petition for rehearing and suggestion for rehearing in banc. On July 29, 1976, the petition for rehearing and suggestion for rehearing in banc was denied, one member of the panel voted to grant panel rehearing and recommended that in banc rehearing be granted. The Court of Appeals has stayed its mandate pending action by this Court.

official "is not charged with predicting the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 557 (1967). He is liable only for acting in disregard of "settled, undisputable law", of "basic, unquestioned constitutional rights." *Wood v. Strickland,* 420 U.S. 308, 321-322 (1975).

ARGUMENT

NEGLIGENCE IS NOT A PROPER BASIS FOR RELIEF UNDER SECTION 1983

In order to state a claim cognizable under section 1983, a plaintiff must show (1) that public officials have intentionally deprived him of a right secured by the federal constitution and (2) that such deprivation was effected under color of state law. *Paul v. Davis,* 424 U.S. 693, 696-697 (1976).

In *Monroe v. Pape,* 365 U.S. 167, 187 (1961), this Court dispensed with any need for a showing that a public official being sued under section 1983 had *specifically* intended to violate a plantiff's constitutional rights.[11] However, *Monroe* did not dispense with the need to show that the conduct engaged in was intentional. In stating that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions", *Monroe* was referring to its own facts showing intentional conduct by police officers so fla-

[11]Of course negligent conduct was not at issue and was not considered by the Court in *Monroe.*

grant that they were bound to know it would, as a "natural consequence", deprive plaintiffs of their constitutional rights.[12] So viewed, *Monroe* is entirely consistent with the Court's present standard articulated in a series of recent decisions that public officials are liable under section 1983 only if they act intentionally either with malicious intent to cause a deprivation of rights or with deliberate indifference to "clearly established" rights of which they knew or reasonably should have known. Negligent conduct is not within such a formulation.

A. Congress Intended to Impose Liability for Intentional Conduct Only.

"Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted." *District of Columbia v. Carter,* 409 U.S. 418, 425 (1973). The controlling concern of the proponents of the legislation was the wave of violence and terror perpetrated by the Ku Klux Klan against both blacks and their white sympathizers. *Id.* However, equally important was the legislators' concern for the inaction of the state and local governments to control the situation. *Id.* at 426. For example, Representative James A. Garfield of Ohio, the future President, noted that the problem was not that state laws were inadequate, "but that even where the laws are just and equal on

[12]*See,* McCormack, *"Federalism and Section 1983"*, 60 Va. L.R. 1, 54-55 (1974); *see also* 2 Devitt and Blackman, Fed. Jury, 177 (Intent—defined), 156 (Negligence—defined), 285-290 (Civil Rights cases).

their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection . . .'"[13]

As one commentator has noted:

> "The debates thus lay bare the background of the bill: Outlaws whipping, robbing and murdering with the tacit complicity (if not the active conspiracy) of those responsible for the enforcement of local police regulations."[14]

Thus, the conduct for which the Ku Klux Act was to provide a remedy was intentional conduct, of the type classified either as crimes or intentional torts, which resulted in the deprivation of a fourteenth amendment right. Nothing in the history or statutory language itself refers to negligence in any form.[15]

Neither does the use of the word "neglect" in the Act import negligence. The word is used only in section 1986 and not in section 1983.[16] Its meaning in

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[13]Cong. Globe, 42nd Cong., 1st Sess. 390 (1871), Appendix 153.

[14]Shapo, *Constitutional Tort: Monroe v. Pape and Beyond*, 60 Nw. U.L.R. 277, 281 (1965).

[15]Negligence has been considered a separate tort since 1825 (W. Prosser, *Law of Torts*, p. 140 (4th ed. 1971), well before adoption of section 1983.

[16]The specific inclusion of the term "neglect" in 1986, but not in 1983, was deliberate and evinces a congressional intent to limit section 1983 to affirmative intentional conduct. (*Compare Monroe v. Pape* (365 U.S. at 187) considering the omission of the word "wilfully" in section 1983.) Such intentional conduct includes a refusal to act upon a request to perform a clear duty. The "deliberate indifference" of *Estelle v. Gamble*, 45 U.S.L.W. 4023 (1976), seems to center about the refusal to act. *Id.* Particularly 4025 n. 10.

section 1986 was explained by Representative Burchard of Illinois who said liability attached only when "secret combinations of men are *allowed* by the Executive to band together to deprive one class of citizens of their legal rights *without a proper effort* to discover, detect and punish the violations of law and order." Cong. Globe, 42d Cong., 1st Sess., App. 315 (emphasis supplied). Thus, section 1986 imposes liability on a ". . . person who, having knowledge . . . and having power to prevent or aid in preventing . . . *neglects* . . . so to do . . ." (Emphasis supplied.) Liability under section 1986 requires an unwillingness to act in the face of actual knowledge. *See, Hampton v. City of Chicago*, 484 F.2d 602, 610 (7th Cir. 1973) *cert. denied*, 415 U.S. 917 (1974). This is wanton conduct, not negligence.

It is clear then that only intentional conduct was meant to be proscribed by the enactment of section 1983.

B. This Court's Decisions Confine Section 1983 To Intentional Conduct.

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court did not dispense with the need to allege a general intent to engage in conduct which results in a constitutional deprivation and certainly did not hold that negligent conduct which produced such a result was actionable. The conduct alleged in *Monroe* was purely intentional, flagrantly so. Further, in *Monroe*, the Court indicated that it was concerned with "an official's *abuse of his position*." 365 U.S. at 172

(emphasis supplied).[17] It is difficult to perceive an abuse of office being anything but intentional conduct.

The subsequent recognition of a qualified immunity for police officers in *Pierson v. Ray,* 386 U.S. 547 (1967) based on good faith demonstrates that intentional conduct was the focus of section 1983, for two reasons. First, the alleged conduct in *Pierson* was intentional. 386 U.S. at 555-557. Second, the assertion of subjective good faith as a matter of common sense is addressed solely to intentional conduct or deliberate omission. Under *Pierson,* the officer also had to act pursuant to a reasonable belief to assert good faith. This objective element of the immunity standard cannot co-exist with negligence, which by definition, is unreasonable behavior because "[in] the light of the recognizable risk, the conduct, to be negligent, must be unreasonable. . . ." Prosser, *Law of Torts,* 146 (4th ed. 1971).

After *Pierson* came *District of Columbia v. Carter,* 409 U.S. 418 (1973). There, this Court reversed a Court of Appeals' decision which included *dicta* that a public official might be liable in negligence under section 1983. *Carter v. Carlson,* 447 F.2d 358, 365

[17]In his dissenting opinion in *Paul v. Davis,* 424 U.S. 693, 717 (1976), Mr. Justice Brennan quotes the above language from *Monroe* with the same emphasis, but leaves open the question "whether or not mere negligent official conduct in the course of duty can ever constitute such abuse of power." In discussing tort claims against public officials generally, Professor Louis L. Jaffe has stated: "Our central concern is the control of official power. . . . This means, for one thing that our emphasis will be on deliberated rather than negligent conduct, on misuse of power rather than inadvertent miscalculation." Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 Harv. L.R. 209 (1963).

(D.C. Cir. 1971). This Court reversed on other grounds, but stated: "[W]e intimate no view on the merits of respondent's claims insofar as they are based on other theories of liability." 409 U.S. at 420 n.3. If negligent conduct were embraced by the Civil Rights Act, then this specific reservation would have been unnecessary.

Then, in rapid succession, came *Wood v. Strickland, Rizzo v. Goode, Paul v. Davis,* and *Estelle v. Gamble.*

In *Wood* [420 U.S. 308 (1975)],[18] this Court gave definition and content to the qualified immunity afforded public officials in *Pierson v. Ray* and in *Scheuer v. Rhodes,* 416 U.S. 232 (1974). The court stated that a public official had a qualified immunity for good faith conduct and became liable for damages under section 1983 only when he acted either with "malicious intent" to cause a deprivation of constitutional rights or in disregard of "clearly established" constitutional rights of which he knew or reasonably should have known. 420 U.S. at 322. This liability attaches only when settled, unquestioned constitutional rights are involved. *Id.*

Less than one year after *Wood,* the court decided *Rizzo v. Goode,* 423 U.S. 362 (1976). There, the plaintiffs sought an injunction under section 1983 to impose a constitutional duty on supervisory city officials for failing to act to eliminate police misconduct. *Id.* at 376. This Court stated that a persistent pattern of police misconduct alone was insufficient.

[18]*See also, O'Connor v. Donaldson,* 422 U.S. 563, 577 (1975).

A showing that it was based on *deliberate* policy of the supervisory officials (*Id.* at 374)[19] or flowed from an *intentional* effort to invade constitutional rights (*Id.* at 375),[20] was also required. Thus, in the context of injunctive relief, more than a deprivation of rights must be shown, *deliberate* participation by the public officials sought to be enjoined is required. A failure to act, presumably through negligence, is insufficient to justify relief. *Id.* at 376.

Only two months after *Rizzo, Paul v. Davis,* 424 U.S. 693 (1976) was filed. In strongly worded *dicta,* the Court rejected the notion that section 1983 made actionable all common-law torts engaged in by state officials. Specifically, it was stated that the fourteenth amendment was not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701.[21] *See also, Griffin v. Breckenridge,* 403 U.S. 88, 100-102 (1971). Concern was indicated lest "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle" be thought to have claims under section 1983. *Id.* at 698. The majority rather clearly indicated that negligent torts were singularly inappropriate for application of section 1983. *Id.* at 698-699. Moreover, the dissent did not contest the majority's evident

[19]As was true in *Hague v. C.I.O.*, 307 U.S. 496 (1939).

[20]As was true in *Allee v. Medrano,* 416 U.S. 802, 812, 814-815 (1974).

[21]A California prisoner may sue a public employee "for injury proximately caused by his negligent or wrongful act or omission." Cal. Gov. Code § 844.6(d).

disapproval of negligence as a basis of section 1983 liability.[22]

Finally, earlier this term, the court announced its decision in *Estelle v. Gamble,* ..... U.S. ....., 45 L.W. 4023 (1976), holding that allegations of negligence in medical treatment by prison officials at most state a cause of action for malpractice cognizable in state courts. A cause of action under section 1983 is available only where prison personnel intentionally deny or delay a prisoner access to medical care or intentionally interfere with the treatment once prescribed, so as to evidence a "deliberate indifference" to a prisoner's serious illness or injury. 45 L.W. 4025-4026.

In *Estelle,* this Court recognized that though prison officials had a duty to provide medical care to prisoners and injury resulted, the nature and quality of the conduct and not simply its consequences had to be evaluated to determine whether there was a section 1983 claim. Thus, the Court of Appeals erred when it held that section 1983 "places no narrow limitation on the nature and quality of the conduct which it makes actionable but concerns itself entirely with the consequences of that conduct." (App. Pet. vii.) Even though the harmful consequences may be identical, under *Estelle* only when they result from deliberate indifference, and not simply from negligence, is there a section 1983 cause of action.

These cases give implicit recognition to the primary deterrent rationale of the statute. A section 1983

[22]*See,* footnote 17, *ante.*

remedy might well deter deliberate conduct or omission, but is not likely to have much impact on inadvertent negligence. Permitting trials to go forward seeking money damages for negligent conduct against underpaid prison guards and wardens will not achieve penal reform. It may even have a reverse effect; capable personnel may leave or be discouraged from entering the correctional service.[23]

Moreover, the burden of Civil Rights litigation on the federal courts is well documented and cannot be ignored. In 1960, approximately 300 cases were filed under the general heading of civil rights. In 1974, some 8,400 such cases were filed.[24] The fears expressed by many congressmen in 1871 that the act would work an imbalance in our system of federalism is slowly being realized whenever lower federal courts open their doors to new theories of liability not contemplated by the originators of the legislation. To hold that negligence in any form states a federal claim will subject to the burden of a jury trial and possible liability in damages, thousands of state and local public officials, including prison officials, from the lowliest clerk to a senior executive. As aptly observed in *Jenkins v. Meyers,* 338 F.Supp. 383 (N.D.Ill.E.D.

[23]Aldisert, *Judicial Expansion of Federal Jurisdiction,* 1973 Law & Soc. O. 557, 565-566.

[24]*See,* McCormack, *Federalism and Section 1983,* 60 Va. L.R. 1 (1974). The 1974 Annual Report, Administrative Office of the United States Court, Table 49, p. 220-221, shows that state prisoners filed 218 civil rights cases in 1966, 4,174 in 1973 and 5,236 in 1974. Thus, there was a 2,300 percent increase in 1974 over 1966 and a 25 percent increase of 1974 over 1973. A total of 8,400 civil rights cases were filed in 1974. *Id.* Table 41, p. 205.

1972) *aff'd* 481 F.2d 1406 (7th Cir. 1973), to hold that unintentional torts state a section 1983 claim:

> "would convert every minor mistake especially in the milieu of a prison, into a §1983 violation. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable." 338 F.Supp. at 390.[25]

This Court has recently made a similar observation:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect

[25]As noted in *Preiser v. Rodriguez,* 411 U.S. 475 (1972):

> "The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." 411 U.S. at 492. *Also see, Wolff v. McDonnell,* 418 U.S. 539, 561-562 (1974).

or ill-advised personnel decisions." *Bishop v. Wood,* ..... U.S. ....., 48 L.Ed.2d 684, 693 (1976).

In sum, both the historical origins of section 1983 and the decisions of this Court teach that intentional conduct or a wilful failure to act evincing deliberate indifference to settled rights—and not negligence—states a cause of action under the statute.[26] Here, Navarette's third cause of action alleges only negligent and inadvertent conduct by the subordinate correctional officers and negligent training of the subordinates by the supervisory officials (A 12-13). Navarette's complaint was drafted by counsel. Hence, *Haines v. Kerner,* 404 U.S. 519 (1972) affords him no solace. Since negligence does not suffice to support a claim under section 1983, the Court of Appeals erred in reversing the district court judgment granting summary judgment of the third cause of action.[27]

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[26]Some lower federal courts have misapprehended the true scope of § 1983; however, the modern trend rejects negligence as a basis for section 1983 liability. Note especially *Bryan v. Jones,* 530 F.2d 1210 (5th Cir. 1976) [en banc]; limiting *Whirl v. Kern,* 407 F.2d 781 (5th Cir. 1969) and *Bonner v. Coughlin,* 545 F.2d 565, (7th Cir. 1976) [en banc] limiting *Joseph v. Rowlen,* 402 F.2d 367 (7th Cir. 1968); *see, Jenkins v. Meyers,* 338 F.Supp. 383 (N.D. Ill. E.D. 1972) *aff'd,* 481 F.2d 1406 (7th Cir. 1973); *also see Harper v. Cserr,* 544 F.2d 1121, 1124 n.1, 1125 (1st Cir. 1976); *Williams v. Vincent,* 508 F.2d 541, 546 (2nd Cir. 1974); *Kent v. Prasse,* 265 F.Supp. 673 (N.D. Pa. 1967) *aff'd,* 385 F.2d 406 (3rd Cir. 1967); *cf., Howell v. Cataldi,* 464 F.2d 272, 279 (3rd Cir. 1972); *Brown v. United States,* 486 U.S. 284, 286 (8th Cir. 1973); *contra, McCray v. Maryland,* 456 F.2d 1, 5-6 (4th Cir. 1972).

[27]By a parity of reasoning, the Court of Appeals also erred in reversing the dismissal of plaintiff's sixth claim; alleging negligent termination of certain of his legal activities (A 17).

C. Plaintiff Has Suffered No Constitutional Deprivation.

In any event, it is petitioners' position that Navarette suffered no constitutional deprivation cognizable under section 1983.

Navarette alleged that petitioners negligently and inadvertently failed to mail certain of his letters in 1971 and 1972 thereby violating his right of free speech. The Court of Appeals held that this allegation stated a claim for deprivation of a "fundamental and reasonably well-defined" right of the prisoner plaintiff.

In *Wood v. Strickland,* 420 U.S. 308, 321-322 (1975), this Court held that a public official is liable under section 1983 only for acting in disregard of "basic, unquestioned constitutional rights" of which he was or should have been aware. In 1971 and 1972 there was no fundamental right of a prisoner to correspond as part of a first amendment right of free expression or otherwise. To the contrary, a number of cases indicated there was no such right. *McCloskey v. Maryland,* 337 F.2d 72 (4th Cir. 1964); *Lee v. Tahash,* 352 F.2d 970 (8th Cir. 1965); *Sostre v. McGinnis,* 442 F.2d 178, 199 (2nd Cir. 1971) *cert. den. sub nom., Oswald v. Sostre,* 405 U.S. 978 (1972). Lower court decisions in the Ninth Circuit finding such a right came later. *Martinez v. Procunier,* 354 F.Supp. 1092, 1097 (N.D. Cal. 1973); *McKinney v. DeBord,* 507 F.2d 501, 505 (9th Cir. 1974).

Indeed, in *Procunier v. Martinez,* 416 U.S. 396, 408 (1974) this Court declined to create such a right. The court also commented on the variety of inconsis-

tent approaches taken by the lower federal courts concerning regulation of inmate correspondence stating:

> ". . . the uncertainty of the constitutional standard makes it impossible for correctional officials to anticipate what is required of them . . ." 416 U.S. at 407.

If the posture of the law was uncertain in 1974, it was even less settled in 1971 and 1972. Applying the qualified immunity doctrine of *Wood v. Strickland* in this context precludes liability as a matter of law since there simply was no "undisputable", "unquestioned", "clearly established" right of a prisoner (or even of his addressee) to correspond, protected by the First Amendment. 420 U.S. at 321-322. A public official cannot be "mulcted in damages" for failing to predict "the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 555-557 (1967). *A fortiori,* subordinate prison officials should not be subjected to trial and damages liability for such failure.

Under our federal system, no constitutional right is "clearly established" until first articulated by this Court and then a reasonable period of time for dissemination of this Court's ruling is permitted.[28] In *Martinez,* this Court held only that a free person had a First Amendment right to correspond with a prisoner. 416 U.S. at 408. The court noted that this right "does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter." *Id.* Thus, even if *Martinez* had been settled law in 1971-1972, it would have been the nonprisoner addressees, not Navarette, who had a section 1983 cause of action for damages.[29]

[28] *See, Rizzo v. Goode,* 423 U.S. 362, 377-380 (1976); *cf., Schneckloth v. Bustamonte,* 413 U.S. 218, 249 (1973).

CONCLUSION

We respectfully request that the judgment of the Court of Appeals be reversed.

Dated, February 28, 1977

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(Appendix Follows)

[29] *See also, Mukmuk v. Com'r of Dept. of Correctional Services,* 529 F.2d 272, 277-278 (2nd Cir. 1976).

APPENDIX

Appendix

(A) 42 *United States Code,* section 1986 provides:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

(B) *California Government Code* section 844.6 provides:

"§ 844.6. Injury by or to prisoner

(a) Notwithstanding any other provision of this part, except as provided in this section and in Sections 814, 814.2, 845.4, and 845.6, a public entity is not liable for:

(1) An injury proximately caused by any prisoner.

(2) An injury to any prisoner.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Except for an injury to a prisoner, nothing in this section prevents recovery from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action, based on such malpractice, to which the public entity has agreed."

(C) *California Director of Corrections' Rules then read:*

"D2402. USE OF THE MAIL PRIVILEGES.

* * *

"10. You may not send registered or certified mail, or any communication or article requesting a return receipt, without permission of the institutional head. Nothing in these rules shall deprive you of correspondence with your attorney, or with the courts having jurisdiction over matters of legitimate concern to you."

"13. Except with the permission of the institutional head, you may not correspond with other inmates or ex-inmates of any correctional institution. In addition we must obtain the permission of their *supervisor* before you can correspond with anyone on probation or parole."

"D2403. APPROVAL OF CORRESPONDENCE LIST. Except by permission of the institutional head, you will be permitted to correspond only with those whose names appear on your approved correspondence list. This list will be limited to ten names. Special purpose letters may be authorized."

CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, *et al.*,

Petitioners,

v.

APOLINAR NAVARETTE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether negligent interference with a prisoner's outgoing correspondence in 1971-1972 by mail-handling prison officials and their superiors states a cause of action for damages under §1983?

STATEMENT OF THE CASE

Plaintiff alleges in the third cause of action of his amended complaint that defendants, consisting of six named California prison officials, negligently interfered with his outgoing mail

during the fifteen months that he was incarcerated at Soledad Prison, from September 1, 1971 to December 11, 1972. The complaint charges that three of the defendants, subordinate officials at Soledad who process his outgoing mail, negligently confiscated or otherwise caused loss of at least twenty-five of his letters. (A 6-9).[1] The remaining defendants consist of supervisory officials: the state director of the Department of Corrections, the Soledad warden, and the Soledad associate warden. The complaint alleges that these defendants defaulted in their administrative duties to supervise prisoner mail regulation at Soledad by failing to provide the subordinate defendants with sufficient training and guidance to remove the unreasonable risk of interference with outgoing letters protected under constitutional free expression and due process guarantees.

The twenty-five pieces of lost or destroyed mail enumerated in the complaint include: seven letters describing the political struggle by Mexican-Americans against racial discrimination which plaintiff attempted to mail concurrently to as many news media addresses [A 7-8 (item 9)]; letters seeking legal assistance from three law projects as well as three law students [A 6-8 (items 1, 6, 8, 11, 12, 13)]; six letters requesting funds for legal expenses, sample pleadings, and other help for his legal efforts from other inmates and the secretary to Cesar Chavez [A 6-7 (items 2, 3, 4, 5)]; and six letters to personal friends [A 7-8 (items 7, 9, 10)]. As described in the within complaint, the blockage of some of this mail produced prolonged frustration of plaintiff's efforts to file a federal writ of habeas corpus in his own behalf as

[1] Defendants mistakenly understate the number of involved letters to be thirteen (Appellant's Brief, p. 3)

well as to file the within civil rights action.[2] In September and November, 1971, plaintiff wrote letters to Stanford law students asking for help on his federal habeas corpus

[2] Plaintiff asserts the full range of his constitutional free expression and due process rights established in 1971-72, including the due process right of access to the courts. In so doing, plaintiff contends that defendants incorrectly assert that the right of access has already been ruled against and relinquished herein (Petitioners' Brief, p. 3, n. 2). Plaintiff further contends that, in any case, this court can consider said guarantee under the authority of *Boynton v. Virginia*, 364 U.S. 454 (1960), because linked to the rights of free expression and procedural due process by the common core issue herein posed as to the extent to which prisoner mail was constitutionally protected against unreasonable interference in 1971-72. Also see: *Procunier v. Martinez*, 416 U.S. 396 (1974) [First Amendment rights of prisoners' correspondents considered although not raised below]. Explicit assertion of the right of access is necessary to address squarely this common issue because, in 1971-72, that right, although overlapping with the right of free expression, was not necessarily coterminous therewith nor equally established.

Turning to the history of this action, the dismissal order which the district court below granted as to the original complaint on February 9, 1973 excised from that complaint "all issues except obstruction of mail," (R 20). That order patently dealt with factual issues rather than theories of law: rather than delimit the guarantees which plaintiff could assert as protecting his mail from obstruction, the aim and effect of the order was to strike from the complaint certain collateral allegations concerning plaintiff's excessive difficulties in gaining access to a notary public and securing needed forma pauperis documents (R 4). The within second amended complaint does sufficiently assert the right of access in relation to mail obstruction. Facts indicating denial of this right are alleged in sufficient detail (see above text discussion), and, although the right of access is not therein named in terms, the due process guarantee from which it springs is expressly asserted by the third cause of action (A 100, 13). That the within complaint encompassed plaintiff's right of access to the courts was certainly not lost on defendants. In their motion for dismissal or summary judgment brought after filing of the within complaint, defendants expressly argued that the first three causes of action, involving mail interference, should be dismissed because the right of access was not in terms alleged and because these claims possessed insufficient detail concerning how obstruction of plaintiff's legal mail interfered with his court actions (R 114). The district court

(continued)

pleadings.[3] In December, 1971, plaintiff sent his only copy of a draft of these pleadings to the Prison Law Project. He sought to have this letter sent by registered mail, but defendants refused. These draft pleadings then becoming lost in the mail, plaintiff wrote a volley of letters during January, 1972, seeking help to make up the ground thus lost in his legal effort [A 6-7 (items 2, 3, 4, 5)].[4] Plaintiff at last filed his writ of habeas corpus in March, 1972,[5] although he again tried unsuccessfully that September to contact a law student

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(footnote continued from preceding page)
rejected this argument by granting summary judgment rather than dismissal as to the first three causes of action (R 189). The circuit court below thereafter noted the possible bearing of plaintiff's right of access on the correspondence herein enumerated (App. Pet, iii, n.1).

Plaintiff did not, in the within complaint, specify the rights relied upon by the third cause of action beyond referring to free expression and due process, nor did plaintiff press either the right of access or the procedural guarantee intrinsic to first amendment rights in his argument before the courts below, because the decision in *Wood v. Strickland*, 420 U.S. 308 (1975) had not yet been rendered (A 1-2). That decision together with its progeny have thrown into sharper focus than had *Pierson v. Ray*, 386 U.S. 547 (1967), the issue of what rights were settled at the time of the conduct in question, an issue which calls in the within case for closer analysis than before of the historical evolution of particular rights which touch prisoner correspondence.

[3] Plaintiff had previously filed companion writs of habeas corpus in federal court, *Navarette v. Comstock*, 325 F. Supp. 261 and *Navarette v. Comstock*, 325 F. Supp. 264 (C.D. Calif. 1971). In both foregoing decisions, rendered on March 26, 1971, the writs were dismissed with leave to refile after further exhausting state remedies. In all likelihood, plaintiff's efforts herein to file a habeas corpus writ were in response to that opportunity for refiling.

[4] Evidence submitted for summary judgment reveals that, during January, 1972, plaintiff also wrote at least four letters to the Prison Law Project inquiring about the lost habeas corpus pleadings (R 83-88, 129).

[5] In his original complaint herein, plaintiff alleged that the mail interference described hereinabove forced him to prepare the writ of habeas corpus totally from notes and memory (R 4).

for help in this habeas corpus action [A 7 (item 8)]. In February and March, 1972, plaintiff tried to start the within civil rights action, enclosing copies of his drafted complaint in successive letters asking law projects to represent him.[6] Plaintiff, pro se, finally filed his first complaint in the within action on October 30, 1972,[7] seeking temporary and permanent injunctive relief against mail interference as well as damages (R 1, 5, 6). However, no immediate decision was made concerning the requested injunctive relief, and this request thereafter lost its urgency when plaintiff received his parole release on December 11, 1972 (A 5). Plaintiff therefore omitted the request for injunctive relief from later amended complaints.

Without filing any other response to the within complaint, defendants moved for dismissal or summary judgment. In support of summary judgment, defendants submitted affidavits by all defendants but the state director (R 139-142), their written records of plaintiff's correspondence (R 129,

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[6] Defendants mistakenly argue that plaintiff's letter to La Casa Legal during February 1972 [A 7 (item 6)] must have reached this law project because "on February 2, 1972, La Casa attorneys filed a brief herein (R 22)" (Petitioners' Brief, p. 4, n.4). In fact, the brief to which defendants refer was filed on February 2, 1973 (R 22), not in 1972, and plaintiff never made contact with this law project by letter or otherwise, until after his parole release in December, 1972 (R 187-188). Indeed, had plaintiff successfully contacted La Casa Legal when he tried to do so in February, 1972, this project might have obtained injunctive relief in time to avert much of the mail interference involved herein.

[7] Plaintiff actually had raised essentially the same claims in an earlier complaint filed with the same court on August 14, 1972 (App. Pet. 2; R 22). In September, 1972, the court ordered plaintiff to replead his claims more succinctly (R 22). Plaintiff did so, filing his revised complaint on October 30, 1972. The court clerk thereupon assigned a new action number to the letter complaint (App. Pet. 2; R 22). The earlier complaint has not been made part of the within record.

131, 133, 135, 138), and certain prisoner regulations issued by the state director (R 144-156).[8] In opposition thereto,

[8] The regulations submitted by defendants which controlled prisoner mail until August 10, 1972, and hence affected virtually all plaintiff's obstructed correspondence, were premised on the policy that the sending and receiving of mail by prisoners "is a privilege, not a right," [D2401] (R 144). Apart from assuring correspondence with licensed attorneys and courts [D2406] (R 151), and certain enumerated state officials [D2404] (R 151), the regulations provided only this guidance for evaluating content of prisoner correspondence:

> "You may not sent or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain prison gossip or discussion of other inmates; or are otherwise inappropriate." [D2402(8)] (R 145)

Under these regulations, each prison warden possessed unlimited discretion to allow or disallow any correspondence with persons not on an approved list [D2403] (R 145), any outgoing letters that exceed a page in length [D2402(6)] (R 145), the sending of any outgoing letters by registered mail [D2402(10)] (R 145), and any correspondence with inmates at other prisons [D2402(13)] (R 145). A later amendment to these regulations, issued on April 30, 1971, provided further that each warden "may provide for the censoring of inmate correspondence . . . as deemed necessary," [D2406] (R 151).

Until August 10, 1972 the state regulations did not require that inmates be notified of disallowed mail, although defendants apparently acknowledge that it was their practice at least to return disallowed mail to inmates (R 140, 142). From the wording of his bulletin on August 10, 1972, it appears that the state director had, prior to that date, required that inmate appeal procedures be established within each prison (R 156), although no evidence yet exists to disclose whether any such appeal procedure existed at Soledad, or, if so, whether it was available to inmates dissatisfied with disallowances of their mail.

In his bulletin issued to all correctional staff on August 10, 1972, the state director decreed the new policy regarding prisoner mail that "[c]orrespondence . . . should be allowed to the maximum extent compatible with total institutional needs and resources," (R 155) and accordingly announced that the discretion of prison administrators to deny items of prisoner correspondence would be limited to situations either threatening institutional safety and order, or involving harmful relationships. (R 155). The bulletin also provided that all denied correspondence should be justified by written reasons supplied on

(continued)

plaintiff submitted five affidavits (R 75-89, 183-184).[9] In ruling as to the third cause of action, the district court

(footnote continued from preceding page)
request to the inmate, and that the inmate should be apprised of his recourse through "the established institutional appeal procedure," (R 155-156). Plaintiff posted only one of his obstructed letters after the date of this bulletin [A 7 (item 8)].

[9] Defendants argue that all the correspondence herein alleged to have been obstructed, except only plaintiff's letter to the Prison Law Project in December, 1971, could well have been refused through valid applications of the state mail regulations (Petitioner's Brief, p. 3, n. 4) yet defendants' affidavits concerning their asserted good faith in handling plaintiff's mail notably lack any assertion that their efforts to comply with applicable regulations were reasonable (R 140, 142). Indeed, the following violations of the state regulations are apparent:

(1) *Letters protesting discrimination:*

Plaintiff's eight concurrent letters to seven news media addresses and Roger Cortez (apparently a personal friend) were disallowed by defendants Neal and Kramer, Soledad correctional counselors, because "not legal mail [and] not business or personal mail," (R 138). This ground for disallowance patently lies outside the pale of the grounds specified in D2402(8) of the state regulations. Whereas D2402(8) at least requires that, to justify their denial, letters must possess disallowable characteristics, the basis for disallowance used with these letters adopts the converse approach of specifying narrow criteria, wholly unrelated to D2402(8) grounds, which a letter must fit to be allowed. The arbitrariness of this basis for disallowance is further indicated by the fact that, on other occasions during 1972, letters from plaintiff to certain of these same news media addresses were indeed permitted (twice in April to Chicano Daily, twice in May to La Opinion, once in May to El Hispano, and once in August or September to La Verdad) (R 129, 131, 133). Moreover, although it appears that plaintiff was given a copy of the above-quoted reasons for disallowance of these letters (R 138), there is no evidence that he was informed of any opportunity to challenge the disallowance, although a procedure to do so may well have existed at Soledad by that time (see footnote 8, supra).

(2) *Mail to Law Projects:*

The letter to the Prison Law Project was presumably mailed (R 129), but it appears that defendant Johnson, the Soledad mailroom clerk,

(continued)

granted summary judgment to defendants without opinion (R 187). The court below reversed this ruling, stating that

(footnote continued from preceding page)
refused plaintiff's request to send it by registered mail (R 75). This refusal apparently violated the regulation providing that such requests are to be determined by the prison warden in his discretionary judgment [D2404(10)] (R 145). Despite defendants' contention to the contrary regarding the letter to La Casa Legal (See Appellant's Brief, p. 4, n. 4, and footnote 6, supra), it appears that the letters to this law project as well as the law project at Santa Clara University were never sent (R 129), despite the assurance given attorney mail by D2406 of the state regulations. In light of evidence that the Soledad warden was unsympathetic toward prisoner civil rights actions (R 81), the possibility appears that the within subordinate defendants resorted to unreasonable grounds to deny these letters because of a similarly adverse attitude toward civil rights actions (particularly in that they were probably named as defendants by the draft complaint contained in these letters). These subordinates may for example have clung unreasonably to a disbelief that the addressee law projects were staffed by licensed attorneys.

(3) *All Denied Correspondence:*

Apart from the letter to the Prison Law Project and the news media letters, the balance of plaintiff's correspondence herein obstructed could well have been unaccountably lost or mislaid due to inadvertant mishandling, rather than intentionally disallowed. In any case, none of this obstructed mail, whether inadvertantly mishandled or affirmatively disallowed, was ever returned to plaintiff. Failure to do so violated the seemingly conceded practice at Soledad of returning to the inmate all mail deemed not in compliance with state or institutional regulations (R 140, 142). Furthermore, affirmative disallowance of the letters to law students Burke and Sonora, or the personal letters to Serna, could well have violated the regulations since letters from plaintiff were permitted to these addresses on many other occasions [five times between July and November, 1972, to Burke (R 131, 133); twice during October and November to Sonora (R 133); once during April and twice during August, 1972 to Serna (R 129, 133)]. Even if these last-mentioned letters were subject to administrative discretion under applicable regulations, the inconsistency of disallowing them while permitting other letters to the same addresses strongly suggests violation of the purpose, implicit in the very existence of such regulations, to assure consistent decision-making.

summary judgment as to the third cause of action was improper in light of the evidence (App. Pet. viii, n. 6). In reaching this holding, the court below did state that a deprivation of federal rights "need not be purposeful to be actionable under §1983" (App. Pet. vii), but carefully added this caveat:

> "Of course we do not imply that all tortious conduct engaged in by a public official acting under color of law is subject to redress under §1983 . . . Nevertheless, here the prisoner's rights which Navarette alleges to have been violated are fundamental and reasonably well-defined; his allegations that state officers negligently deprived him of those rights state a §1983 cause of action." (App. Pet. viii).

SUMMARY OF ARGUMENT

Defendants' argument that the legislative intent underlying §1983 as well as recent decisions by this Court constrict the reach of §1983 solely to intentional conduct falls of its own weight when examined.

In *Monroe v. Pape*, 365 U.S. 167 (1961), an exhaustive analysis of the legislative history underlying §1 of the Klu Klux Klan Act of 1871 revealed that, in enacting this predecessor to §1983, Congress by no means wished to limit this remedial statute to a narrow focus on purely intentional conduct by offending state officials. To the contrary, the Congress was alarmed by the widespread failures of state officials to protect the federal rights through enforcement of available state laws, and designed this remedial statute to reach the full gamut of such failures, neglectful or otherwise. *Monroe* confirmed this intended scope of §1983 in clear language designed to be a definitive construction of said statute rather than merely a holding on the facts therein.

The decisions by this Court since *Monroe*, cited by defendants in support of their contention, do not engraft any

state of mind requirement upon §1983 claims. *Rizzo v. Goode*, 423 U.S. 362 (1976), concerned the causation requirement of §1983. *Paul v. Davis*, 424 U.S. 693 (1976) delineated due process rights in relation to reputation, and *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976) did likewise in connection with employment interests. *Estelle v. Gamble*, ____ U.S. ____, 50 L.Ed.2d 251 (1976), established the "deliberate indifference" standard purely as a minimum mental state intrinsicallly required by the Eighth Amendment.

While the decision in *Pierson v. Ray*, 386 U.S. 547 (1967), *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and *Wood v. Strickland*, 420 U.S. 308 (1975), do set forth qualifying mental states in relation to allowable immunities, defendants overlook the fact that these mental state requirements possess considerable common ground with the law of negligence. Each of these decisions adapts for §1983 use the common law immunities accorded executive officials by striking balances between the §1983 purpose to remedy official infringement of federally protected rights, and the competing immunity purpose of encouraging official action unencumbered by threat of liability. In each such formulation of qualified immunity for §1983 purposes, this Court has consistently required objectively reasonable conduct of the offending state official, as well as his good faith, before permitting him immunity. The obligations implicit in this requirement of reasonable conduct have been given contours fitting the circumstances of each situation. This Court has thus broadly delineated official conduct which should be subject to §1983 monetary liability along lines closely paralleling the law of negligence. Accordingly, although the question herein presented is cast in terms of negligence, this case provides the opportunity for this Court to refine further the meaning of reasonable conduct in light of policy considerations surrounding §1983 litigation.

In this connection, the law of negligence can furnish useful guidance. Essentially a balancing approach to the resolution of conflicting interests which has been distilled over centuries of

adjudication, negligence doctrine has accumulated considerable wisdom concerning the meaning of reasonable conduct. Indeed, there exists a substantial body of decisional law concerning monetary liability under §1983 in which most lower federal courts have found guidance from negligence doctrine in weighing the meaning of reasonable conduct within particular factual contexts. The lower federal courts have thereby reached some insights into the gauging of reasonable conduct for §1983 purposes which offer further guidance to this Court as it sharpens the meaning of reasonable conduct in relation to the alleged obstruction of this plaintiff's mail by the within prison officials. The obligation of the supervisory officials herein to avoid unreasonable risks of trenching upon plaintiff's constitutional interests should include, in addition to reasonable supervision of mail decisions by subordinates, *Beverly v. Morris*, 470 F.2d 1356 (5th Cir. 1972), reasonable care in establishing and when necessary revising the overall system for evaluating prisoner mail, *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976), *Dewell v. Larson*, 489 F.2d 877 (10th Cir. 1974). The degree of obligation to thus act reasonably should be fixed in light of any institutional limitations, *Brown v. United States*, 486 F.2d 284 (8th Cir. 1973), the comparative decision-making leisure of the within supervisory officials, *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968), and whether or not the involved conduct resulted from any considered exercise of discretion, *Scheuer v. Rhodes*, supra. The obligations of the within subordinate prison officials to function reasonably should concededly be comparatively limited in light of their considerable liability exposure from intensive contact with every aspect of prisoner's lives. However, this consideration is much diminished by situations such as herein where prison officials face similar liability under state law for their negligence, *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972), and where fundamental prisoner freedoms are at stake, *Bonner v. Coughlin*, 545 F.2d 565, 573 (Swygert, J. dissenting) (7th Cir. 1976).

The within prison officials should reasonably have been aware that plaintiff's obstructed correspondence was protected by constitutional guarantees which had become established by 1971 within the meaning of *Pierson v. Ray*, 386 U.S. 693 (1967), and *Wood v. Strickland*, 420 U.S. 308 (1975). As further elucidated by this Court in *Cox v. Cook*, 420 U.S. 734 (1975), and by the lower federal courts, the *Pierson* and *Wood* standards can be met by showing that the rights at issue had been established prior to the infringing conduct by judicial rulings not only from this Court, but equally from lower federal and state courts, particularly the courts within the jurisdictions of which the involved conduct occurred. As state officials assess the applicability of existing decisional law to their own conduct, the *Pierson* and *Wood* standards require such officials to recognize that judicial decisions possess controlling implications reasonably beyond the particular facts giving rise to the decisions.

These standards were herein met by four decisions rendered by the district court below during the two years preceding the time period herein involved. *Hyland v. Procunier*, 311 F. Supp. 749 (N.D. Calif. 1970), *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Calif. 1970), aff'd (sub nom *Younger v. Gilmore*), 404 U.S. 15 (1971), *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Calif. 1970), *Payne v. Whitmore*, 325 F. Supp. 1191 (N.D. Calif. 1971). Each of these decisions clearly affirmed that constitutional rights can only be curtailed for prisoners by state regulation which passes muster under due process reasonableness: two of the decisions, *Hyland* and *Payne*, squarely uphold free expression. Hardly at variance with the trend of decisional law elsewhere, these district court decisions were not only accompanied by similar decisions from California state courts and the circuit court below, but indeed were part of a steadily growing if not already predominant attitude among federal courts throughout the nation that the constitution protects prisoner free expression.

The *Pierson* and *Wood* standards were additionally met herein by decisions from this Court establishing that

regulation of constitutionally guaranteed free expression, including mail, must be accompanied by procedural protection, *Kunz v. New York*, 340 U.S. 290 (1950), *Freedman v. Maryland*, 380 U.S. 1 (1965), *Blount v. Rizzi*, 400 U.S. 410 (1971), as well as by judicial decisions clearly establishing that the due process right of access to the courts protects prisoner mail involving preparation for litigation, *Gilmore v. Lynch*, supra.

I.

SECTION 1983 CLAIMS ARE NOT LIMITED TO INTENTIONAL CONDUCT

A. This Court Has Discerned No Such Limiting Congressional Intent

In its exhaustive analysis of the legislative history underlying §1983, *Monroe v. Pape*, 365 U.S. 167 (1961), discerns no intention by the enacting Congress to circumscribe the reach of the civil remedies created by §1983 to intentional conduct by state officials who infringe upon federally protected rights. In reviewing the Congressional debates preceding passage of §1 of the Klu Klux Klan Act, the direct ancestor of §1983, *Monroe* finds the sense of Congress illustrated by the words of Mr. Lowe of Kansas during the debates that "[w]hile murder is stalking abroad in disguise . . . the local administrations have been found *inadequate* or unwilling to apply the proper corrective," (emphasis added), *Monroe*, 365 U.S. at 175-176. To similar effect is the comment in *Monroe*, 365 U.S. at 174, n.10, that:

> "The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of §1: '[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, *for a mere error in judgment* [he is liable] . . .' (emphasis in original)

Monroe, 365 U.S. at 176-177, recites a statement during the debates by Mr. Burchard of Illinois as likewise recognizing the broad reach of the Klu Klux Klan Act to situations in which

> "secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights *without proper effort to discover, detect*, and punish the violations of law and order."[10] (emphasis added).

This Congressional mood in enacting §1 of the Klu Klux Klan Act is summarized in *Monroe*, 365 U.S. at 180:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance or *otherwise*, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (emphasis added).

It is evident from the tenor of the legislative history reviewed in *Monroe* that the above-emphasized terms, "neglect . . . or otherwise", were advisedly chosen to capture the legislative concern. *Monroe* meant to reflect this historical perspective in fashioning the oft-cited gloss on §1983 that it "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"

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[10]Petitioners quote this passage [Petitioners' Brief at p. 11] in support of their argument that the term "neglect" in §1986 refers to wanton conduct rather than simple negligence. However, petitioners' assumption that the indicated remarks by Mr. Burchard were made with the predecessor of §1986 in mind is subject to serious question in that *Monroe* recites these remarks in the course of reviewing debate relevant to §1 of the Klu Klux Klan Act (now §1983). Moreover, the remarks themselves appear to be more directed toward the §1983 focus on state officials who fail, through neglect or otherwise, to enforce the laws, than at the §1986 focus on any person who, despite full knowledge that particular conspiratorial crimes are about to be committed, neglects or refuses to help in preventing the crimes.

Monroe, 365 U.S. at 187. The introductory statement in *Monroe*, 365 U.S. at 172, that the Court therein faced the issue of whether §1983 extended to "an official's abuse of his position" hardly connotes a prejudgment by the Court that §1983 is limited in every potential application to intentional conduct by state officials. It would untenably distort the meaning of that phrase to give it any coloration other than that of the historical analysis which it introduces.[11] *Monroe* clearly imposed no minimum state of mind requirement upon the character of official conduct made actionable by §1983.[12]

Petitioners further contend [Petitioner's Brief, p. 10, n. 16] that §1983 should be limited to intentional conduct because the language of said statute lacks the term "neglect", whereas Congress advisedly included said term in §1986. However, while it may well be appropriate to conclude that Congress acted advisedly in withholding said term from §1983, just as *Monroe* concluded as to absence from §1983

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[11]Petitioners' contention that "[i]t is difficult to perceive an abuse of office being anything but intentional conduct," (Petitioners' Brief, p. 12) is belied by the breadth of meaning given the term "abuse" by Webster's New World Dictionary (Second Coll. Ed.), p. 6: "(1) wrong, bad, or excessive use (2) mistreatment; injury (3) a bad, unjust, or corrupt custom or practice."

[12]It is noteworthy that the dissenting opinion by Justice Frankfurter in *Monroe*, 365 U.S. at 202-259, did agree with the majority that conduct actionable under §1983 should not be limited to actions infused by certain mental states. Observing that the specific intent requirement established in *Screws v. United States*, 325 U.S. 91 (1944), was largely a fiction diluted "in practice to mean no more that intent without justification to bring about the circumstances which infringe . . . rights," Justice Frankfurter concluded as to this point,

> "If the courts are to enforce [§1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation . . . Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient." *Monroe*, 365 U.S. at 207-208.

of the term "wilfully", Petitioners' statutory construction hardly follows. It can reasonably be concluded only that Congress intended by use of the term "neglect" in §1986 to limit liability thereunder more narrowly than under §1983. Whereas §1986 provides for liability in damages as its exclusive remedy, §1983 provides for redress in both law and equity. Accordingly, the term "neglect" limits §1986 liability for the private defendants sued thereunder to conduct no less than negligent, a result consistent with tort principles prevailing when the Klu Klux Klan Act was enacted. In contrast, equitable principles–then as now–called for no such rigid limitation upon the equitable relief afforded by §1983, and accordingly none was imposed by the §1983 language. Further support for this construction is found in the fact that §1983 actions lie against state officials. Congress may plausibly have intended to impose monetary liability upon a comparatively broad range of conduct by such defendants, in contrast to §1986 liability, due to the fact that Congress plainly considered unmet responsibilities of state officials to constitute a central contributing factor to the continued widespread lawlessness.

B. This Court Has Not Imposed Any Such Limitation

Petitioners claim that recent decisions by this Court construing §1983 have consistently limited the reach of this statute to intentional conduct by state officials. However, apart from the decisions defining qualified immunities available under §1983 (considered at pp. 30-36, infra), these decisions undertake to clarify parameters of valid §1983 claims which bear no relation to any new requirement for all §1983 claims that the wrongdoing state official possess some qualifying mental state. To the extent that a common thread can be discerned among these latter decisions, it appears to consist in defining justiciable §1983 claims in a manner which accords this civil rights statute "a sweep as broad as [its]

language," *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971), while refraining from making "of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis*, ____ U.S. ____, 47 L.Ed.2d 405, 413 (1976). None of these decisions revise or add to the literal requirements for stating a claim under §1983: namely, that (1) defendant deprive plaintiff, or cause his deprivation of a federally protected right: and that (2) defendant in so doing act under color of state law. Cf. *Adickes v. Kress & Co.*, 398 U.S. 144, 151 (1970).

Thus, in *Rizzo v. Goode*, 423 U.S. 362 (1976), this Court concluded that the causation requirement expressed by the statutory language of §1983 was unmet by the tenuous connection found between the inaction of defendant city officials and the misconduct of a small handful of police officers. In thus ruling, this Court by no means held that actions by supervisory defendants specifically intended to invade constitutional rights, such as involved in *Hague v. C.I.O.*, 307 U.S. 496 (1939) and *Allee v. Medrano*, 416 U.S. 802 (1974), were necessary to a sufficient showing of causation. Rather, this Court simply required "some showing of direct responsibility", *Rizzo*, 423 U.S. at 376, attributable to the supervisory defendants. No such showing could be derived from the facts therein for two reasons: because (1) there was no "affirmative link between the . . . police misconduct and the adoption of any plan or policy by petitioners–express or otherwise–showing their authorization or approval," *Rizzo*, 423 U.S. at 371, and (2) the alternative of an unmet affirmative duty, therein proposed by the lower court in terms of a duty owed to the entire citizenry of the city to minimize police misconduct, was unacceptably diffuse under those facts. Hence, the point of *Rizzo* is that the action or inaction of a supervisory defendant must directly cause the unconstitutional harm before he can be held responsible

therefore, not that such a defendant can be held to account only if he intended the harm.[13]

Similarly, *Paul v. Davis*, supra, was not concerned with excising all negligent official behavior from the ambit of §1983, but rather with clarifying the extent to which an individual's interest in reputation may enjoy protection under the procedural and substantive guarantees of Fourteenth Amendment due process. In determining said question, this Court emphasized as to §1983 actions generally that a plaintiff must be able to point to a "specific constitutional guarantee safeguarding the interest he asserts has been invaded," *Paul*, 47 L.Ed.2d at 413, before he can turn for any relief to §1983. Unless such a constitutional guarantee also be involved, the invasion by a state official of an interest protected under state law cannot, merely because of the official status of the defendant, give rise to a §1983 claim. Thus it follows from this conclusion that many intentional wrongs as well as negligent wrongs lie outside the ambit of §1983.

In the same vein, *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976) was concerned not with insulating unintentionally mistaken personnel decisions by public agencies from the reach of §1983, but rather–much as in *Paul*–with clarifying the bounds of procedural due process guarantees for a discharged public employee. These bounds of due process protection were demarcated in *Bishop* not by consideration of how innocent or aggravated was the mental

[13]It appears clear that no *Rizzo* problem of causation exists as to the supervisory defendants herein. These defendants issued and implemented such vague and ambiguous prisoner mail rules that the frequent failure of their subordinates to follow the rules in practice was clearly sufficiently foreseeable, whether or not the subordinates were themselves negligent in thus departing from the rules, to render these supervisory defendants legally responsible for the resultant widespread arbitrariness in handling prisoner mail. This Court in effect so held in *Procunier v. Martinez*, 416 U.S. 396 (1974).

state of the employer. The demarcation was made instead through precise articulation of the characteristics intrinsic to the due process liberty or property rights potentially implicated.

In parallel fashion, this Court determined in *Griffin v. Breckenridge*, supra, that the legislative history to §1985 revealed no Congressional intent to limit that civil rights provision by a "color of law" requirement, and accordingly overturned the contrary ruling in *Collins v. Hardyman* (1950) 341 U.S. 651. This Court simultaneously cautioned that §1985 was not "intended to apply to all tortious, conspiratorial interferences with the rights of others," *Griffin*, 403 U.S. at 101, and that "constitutional shoals . . . lie in the path of interpreting §1985(3) as a general federal tort law," *Griffin*, 403 U.S. at 102. The Court avoided the risk that §1985 would thereafter be extended to ordinary assaults by multiple assailants through its ruling that a valid claim thereunder must include "the kind of invidiously discriminatory motivation stressed by the [enacting Congress]," *Griffin*, 403 U.S. at 102.

As in *Paul* and *Griffin*, the decision in *Estelle v. Gamble*, 429 U.S. 97, (1976), is concerned with fixing the ambit of a particular constitutional guarantee–here the Eighth Amendment. Facing the context of shortcomings in medical treatment for prisoners, this Court reviewed the meaning which previous decisions had given the guarantee against cruel and unusual punishment, and determined that "deliberate indifference to serious medical needs of prisoners," *Estelle*, 429 U.S. at 104, is equivalent to the established meaning of the Eighth Amendment. It was on the basis of this meaning intrinsic to the Eighth Amendment–not an abstract commitment to limit all §1983 actions to intentional conduct–that this Court went on to demarcate further the outer limit of this guarantee, *Estelle*, 429 U.S. at 105-106:

> "an inadvertant failure to provide adequate medical care cannot be said to constitute a 'wanton infliction of unnecessary pain' or to be 'repugnant to the conscience

of mankind.' Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."

II.

MONETARY LIABILITY UNDER SECTION 1983 SHOULD REACH EXECUTIVE CONDUCT POSING UNREASONABLE RISKS OF CONSTITUTIONAL HARM

A. Previous Decisions By This Court Impose This Standard

It has been in the context of potential monetary liability of state executive officers that this Court has inquired into the mental states of such officials when engaged in conduct infringing constitutional interests, then permitting immunity to the extent that the weighing of competing interests so warrants. *Pierson v. Ray*, 386 U.S. 547 (1967), *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *Wood v. Strickland*, 420 U.S. 308 (1975). In fashioning standards for such qualified immunity, this Court has turned repeatedly to the touchstone of objectively reasonable conduct. This use of the concept of reasonableness suggests the existence of common ground with the law of negligence. Negligence law does not comprise the rigid doctrine of liability suggested by defendants, either to be incorporated whole cloth into §1983 caselaw or rejected in its entirety. Far from infrangible, the law of negligence amounts to a fluid approach to the resolution of social conflict distilled over centuries of common law adjudication[14]

[14]One commentator reports that the English case of Lowe v. Cotton (1701) involved a civil claim seeking damages from a postal employee for his negligence, the claim being denied by a divided court (Chief Justice Holt dissenting). Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 14 (1963).

and wholly adaptable to use in §1983 caselaw in a manner consistent with surrounding federal policy.[15]

The law of negligence is predicated on the social policy that members of society should be held to an objective standard of reasonable caution concerning the possibility of harming others. In practical effect, compensatory liability is imposed on persons who harm others while engaged in "conduct which involves an unreasonably great risk of causing damage." W. Prosser, *Law of Torts*, (4th Ed. 1971) §31, p. 145. Negligent conduct differs only in degree, in some respects subtly, from intentional conduct where resulting harm is desired or at least substantially certain to follow. In one sense, the distinction between intentional and negligent conduct can be drawn in terms of a continuous scale of descending probabilities of harm:

> "As the probability that the consequence will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes more reckless . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence." Restatement, Second, Torts, §8A Comment.

But the foregoing formula risks obscuring the fact that "the real basis of negligence is not carelessness, but behavior which

[15]A similar adaptation of the tort concepts of recklessnesss and negligence into a federal context was made in *New York Times v. Sullivan*, 376 U.S. 254 (1964), where this Court determined that, in a defamation action, the First Amendment free speech guarantee required more protection for public criticism of government officials than afforded by the common law defense of truth. This Court accordingly fashioned a qualified privilege immunizing public comment unless actually malicious, with such malice to entail at least a "reckless disregard of whether [the statement] was false or not," *Sullivan*, 376 U.S. at 280. Regarding the evidence therein, this Court ruled that the privilege had not been exceeded because there was support for no more than "a finding of negligence in failing to discover [the falsity]," *Sullivan*, 376 U.S. at 288.

should be recognized as involving unreasonable danger to others," W. Prosser, supra, §31, p. 145. While negligent conduct frequently consists in inadvertant or careless unawareness of such danger, "it may also exist where [the actor] has considered the possible consequences carefully, and has exercised his own best judgment," W. Prosser, supra, §31, p. 145, but unreasonable risk nonetheless remains.[16] Thus, an act or omission may at once be intentional as to a factual result desired or substantially certain to follow, but negligent as to the harm thereby caused.[17]

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[16]Reasonable preparation can, of course, sometimes spell the difference between negligent and nonnegligent conduct. Restatement, Second, Torts, §300 (*Want of Preparation*).

[17]This can be true in two senses. First is the sense in which a factual result is intended, but the intention does not encompass any consequence to another. This example is illustrative: "[w]hen an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result," Restatement, Second, Torts, §8A *Comment*. Similar circumstances can readily be imagined, such as target practice in a residential area, where the risk of adversely affecting another rises to unreasonable proportions. The upper limit of conduct in which consequential injury to another lies outside the actor's intention is demarcated by Prosser: "The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it," W. Prosser, *supra*, §8, p. 32. The second sense in which intended action can be negligent or otherwise nonintentional as to resulting harm consists in intended factual results which do encompass affecting another, but involve awareness at most only that a risk exists of the law deeming the intended effect upon another to constitute an injury. It is with reference to intentional action of this second sort that this court has required reasonable awareness of the applicable law, *Pierson v. Ray*, supra, *Wood v. Strickland*, supra, whereas the tort law of trespass and conversion imposes liability even where property is intentionally interfered with "in good faith, under the [actor's] mistaken belief, however reasonable, that [he] is committing no wrong," W. Prosser, *supra*, §13, p. 74 [trespass to land], §14, p. 77 [trespass to chattels], §15, p.. 83 [conversion].

Finally to be emphasized is that the negligence standard of reasonable conduct, far from reducible to a mechanistic or quantitative formula, is the flexible product of a weighing process sensitive to each situation, with the result that "conduct which would be proper under some circumstances becomes negligence under others," W. Prosser, supra, §31, p. 149. As Prosser states further, this standard of conduct

> "is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." W. Prosser, supra, §31, p. 149.

Put another way, the weight attached to the conduct in question depends on its utility to the interest being advanced and the availability of less dangerous alternatives, as well as the social value given the interest itself. See: Restatement, Second, Torts, §292 (*Factors Regarding Utility of Conduct*). A factor related to those quoted above as bearing on the weight given risks thus entailed consists in "the number of persons whose interests are likely to be invaded if the risk takes effect in harm," Restatement, Second, Torts, §293 (*Factors Regarding Magnitude of Risk*).

Similarly to the foregoing negligence precepts, the decisions of this Court in *Pierson v. Ray*, supra, *Scheuer v. Rhodes*, supra, and *Wood v. Strickland*, supra, reach definitions of allowable conduct, gauged in terms of reasonableness, after going through inquiry into underlying policy considerations. In *Pierson*, this Court was moved to allow a qualified immunity to police officers sued for damages under §1983 for making erroneous arrests. To insulate such an officer from the dilemma of liability exposure unmitigated by any intent requirement, putting the officer to an untenable choice "between being charged with dereliction of duty if he does not arrest, and being mulcted in damages if he does," *Pierson*, 386 U.S. at 555, this Court ruled that the prevailing common law defense of good faith and probable cause is available to

police officers as a qualified immunity in such §1983 actions. This Court further ruled, for the same reason, that such an officer is likewise insulated from §1983 liability "for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional," *Pierson*, 386 U.S. at 555. Thus, as to both the suspicion inducing him to make an arrest and his belief in validity of the law authorizing the arrest, the officer may undertake the arrest only upon possessing reasonably sufficient information.[18] These informational requirements are readily translatable into the terms of a negligence standard of conduct.[19] The officer who arrests only upon possession of the requisite factual and legal information thereby reduces to reasonable proportions the risk that he will violate the interest of the person he has under scrutiny against being mistakenly arrested.

In *Scheuer v. Rhodes*, supra, this Court extrapolated from the qualified immunity of good faith and probable cause for arresting police officers to enunciate a similar immunity for other executive officers exercising discretionary duties. Examining the established purpose of §1983 to provide a remedy for persons deprived of federal rights by state officers "whether [the officers] act in accordance with their authority or abuse it," *Scheuer*, 416 U.S. at 243; the court weighed against this statutory purpose the competing interest in encouraging officials to decide and act for the public, even at

[18]Probable cause is defined as "a reasonable ground for suspicion that a [crime] has been committed . . . [provided that] mere suspicion, unsupported by information, is not enough." W. Prosser, supra, §26, p. 135.

[19]The common law, in allowing the defense of good faith and probable cause to arresting officers sued for false imprisonment, in effect interposed a negligence standard (plus a requirement of subjective good faith) for police arrests, in contrast to the strict approach by the underlying false imprisonment tort that the detention or confinement merely be intended, however innocently. In *Pierson*, this Court tracks this common law adjustment of liability exposure.

the risk of some error and injury. A balance was struck curtailing the immunity of such executive officials from the absolute scope which the court below had accorded. Instead, a qualified immunity was granted to executive officials for discretionary acts performed in the course of official conduct, subject to "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, [as they reasonably appeared at the time], coupled with good faith . . . ," *Scheuer*, 416 U.S. at 248. It was further provided as to higher executive officers that, "[l]ike legislators and judges, [they] are entitled to rely on traditional sources for the factual information on which they decide and act," *Scheuer*, 416 U.S. at 246, and that the broader and more subtle options which they must consider call for variations in the scope of this qualified immunity "dependent upon the scope of discretion and responsibilities of the office," *Scheuer*, 416 U.S. at 247.

The requirement evolved by *Scheuer* that executive officers possess reasonable grounds for their discretionary actions is essentially equivalent to a standard of reasonable conduct set in terms of negligence precepts. While these precepts require that investigation be undertaken before engaging in conduct involving unreasonable risks to others whenever this precaution will reduce such risks to reasonable proportions, it is also recognized that precautionary measures should not be required to an extent prohibitively burdensome upon conduct possessing social value.[20] Since decisive emergency action by high executive officials possesses considerable social value and would plausibly be unduly hampered by a requirement that

[20]As Prosser states: "consideration must . . . be given to any alternative course open to the actor. Whether it is reasonable to travel a dangerous road may depend upon the disadvantages of another route . . . A railroad need not do without a turntable because there is some chance that children will play on it and be hurt; but it is quite another matter to keep it locked." Prosser, *ibid*, §32 (*Unreasonable Risk*), p. 148-149.

action be preceded by investigation to minimize risks to others, the foregoing negligence precepts appear consistent with the determination in *Scheuer* entitling such officials to rely on traditional sources for information to use in deciding upon possible action. As an exeecutive official facing discretionary choices enters the process of deciding whether and how to act, negligence precepts would call upon the official reasonably to weigh his available options, both in terms of how effectively each might contribute to the public good and in terms of the types and amounts of risk which each apparently would pose to people affected. So long as the official then selects a course of action which he reasonably determines, from the foregoing weighing process, to be optimal among available options in possessing social value comparatively weighty in relation to whatever risks may be posed thereby, negligence standards would permit him to act with impunity. The *Scheuer* requirement that executive officials possess, in addition to good faith, reasonable grounds for their discretionary actions appears to point towards such a standard of conduct.

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court fashioned a similar qualified immunity for school administrators and board members, insulating them from monetary liability under §1983 for "action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason," *Wood*, 420 U.S. at 321. Acknowledging that some degree of immunity is needed to encourage such officials to exercise their judgment "independently, forcefully, and in . . . the long term interests of the school and the students," *Wood*, 420 U.S. at 320, this Court also pointed to the prevailing common law view which accords such officials only a qualified immunity due to a determination that total immunity would not further enhance forthright action sufficiently "to warrant the absence of a remedy for students," *Wood*, 420 U.S. at 320. In the context of the alleged procedural due process violation by school board members therein, this Court specified further as to the

requirement of reasonableness that such board members must be held to "knowledge of the basic, unquestioned rights of [their] charges," *Wood*, 420 U.S. at 322, explaining that this standard of knowledge posed on unfair burden on holders of a public office requiring considerable intelligence and judgment, and that "[a]ny lesser standard would deny much of the promise of §1983," *Wood*, 420 U.S. at 322. This Court formulated this standard to withhold immunity from a school board member who "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the students affected,"[21] *Wood*, 420 U.S. at 322. The duty of inquiry implicit in this standard of knowledge clearly tracks the negligence precept calling for reasonable preparation before acting whenever the unreasonable risk of harm to others will thereby be averted or reduced to acceptable proportions. The more general standard that action by school officials must remain within the bounds of reason appears, as with the similarly phrased standard in *Scheuer*, to call for the sort of reasonable decision-making, involving the weighing of available options as to their respective risks and comparative merits, which is spelled out by negligence precepts.

B. The Circuits Have Applied This Standard Consistently With Decisions By This Court

In essential harmony with *Pierson v. Ray*, supra, *Scheuer v. Rhodes*, supra and *Wood v. Strickland*, supra, nearly every

[21] In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), this Court extended to a state mental hospital director this standard of knowledge concerning the constitutional rights of one's charges.

Circuit[22] has recognized that the damages remedy which §1983 provides for constitutional harm is not confined to wrongful conduct by state officials which intentionally affect constitutional interests but instead reaches conduct which poses unacceptable risk in some degree, ranging from recklessness to ordinary negligence.[23]

[22]The Seventh Circuit is the only Circuit that presently even approaches disavowing negligence in any degree as a cognizable basis for §1983 damages claims for infringement of constitutionally guaranteed interests. See: *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) [inconsistent dicta as to negligence]; *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974) [greater culpability than mere negligence]; *Jenkins v. Meyers*, 238 F. Supp. 383 (N.D. ILL. E.D. 1972), aff's 481 F.2d 1406 (7th Cir. 1973) [strict liability as to constitutional interest provided factual result intended]; *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972) [negligent omission], limited in *Bonner v. Coughlin*, supra (7th Cir. 1976) [confined to facts indicating purposeful nonfeasance].

[23]FIRST CIRCUIT: *Harper v. Cserr*, 544 F.2d 1121 (1st Cir. 1976) [wanton neglect]; *Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974) [high degree of neglect]; SECOND CIRCUIT: *Williams v. Vincent*, 508 F.2d 541 (2nd Cir. 1974) [recklessness or deliberate indifference]; *Wright v. McMann*, 460 F.2d 126 (2nd Cir. 1972) [facts indicate negligence or recklessness]; THIRD CIRCUIT: *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972) [negligence], limiting *Kent v. Prasse*, 265 F. Supp. 673 (N.D. Pa. 1967), aff'd, 385 F.2d 406 (3rd Cir. 1967); FOURTH CIRCUIT: *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972) [negligence]; *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970) [gross negligence]; FIFTH CIRCUIT: *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976) [high degree of reasonableness]; *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976) [negligence]; *Parker v. McKeithen*, 488 F.2d 553 (5th Cir. 1974), cert. den. 419 U.S. 838 (1974), [gross negligence]; *Beverly v. Morris*, 470 F.2d 1356 (5th Cir. 1972) [negligence]; *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972), modified, 456 F.2d 834 (5th Cir. 1972), cert. den. 404 U.S. 866 (1972) [negligence]; *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968), cert. den. 396 U.S. 901 (1969) [unreasonable inadvertance]; SIXTH CIRCUIT: *Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972) [negligence]; *Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972) [negligence impliedly acknowledged]; EIGHTH CIRCUIT: *Brown v. United States*, 486 F.2d 284 (8th Cir. 1973) [aggravated if not simple

(continued)

In applying negligence law to §1983 claims, the lower federal courts have demonstrated that these precepts can furnish a foundation for sensitive weighing from a federal perspective of such policy considerations as the degree of duty concerning constitutional interests appropriate to impose on state officials.[24] These judicial decisions demonstrate that for negligent no less than intentional infringement of such interests, monetary liability under §1983 can be imposed as a contained and measured response to substantial constitutional harm.

Constitutional deprivation weighs heaviest in the scales of negligence doctrine where supervisorial conduct is involved, particularly where the conduct in question concerns the creation and supervision of administrative practices. Thus in *Roberts v. Williams*, supra, the court considered the grossly negligent shooting of a jail farm inmate by a trusty guard who, wholly unskilled in handling his shotgun, had inadvertantly pointed it in plaintiff's direction with the safety accidentally off. Upholding the verdict on a pendant claim which found the jail farm superintendant negligent in failing to train this trusty guard beyond a brief admonition to be careful, the court went on the rule the superindentant liable under §1983 for violation of plaintiff's Eighth Amendment rights. Acknowledging that ordinary negligence was insufficient to show cruel and unusual punishment, the court concluded the superintendant's conduct to be more aggravated

(footnote continued from preceding page)
negligence]; *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973) [negligence]; NINTH CIRCUIT: *Navarette v. Enomoto*, 536 F.2d 277 (9th Cir. 1976) [decision below]; TENTH CIRCUIT: *Dewell v. Larson*, 489 F.2d 877 (10th Cir. 1974) [negligence]; D.C. CIRCUIT: *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), rev'd (on other grounds), sub nom *District of Columbia v. Carter*, 409 U.S. 418 (1973) [negligence].

[24]Some decisions, however, have applied negligence law with little consideration of involved interests from perspective of pertinent federal policies. See generally: S. Nahmod, *§1983 and the Background of Tort Liability*, 50 Indiana L. J. 5 (1974-75)

because it amounted to "a wrong in prison management, in contrast to the casual dereliction of a minor prison employee," *Roberts*, 456 F.2d at 827. This supervisorial conduct amounted to "callous indifference to [suffering] at the management level . . . in the sustained maintenance, over a period of time, of a needlessly hazardous condition for plaintiff and other prisoners," *Roberts* 456 F.2d at 827.[25] The court took a more restrained view of the comparatively remote involvement of the county supervisors in this trusty guard system. The supervisors could be liable for negligence consisting in a "clear breach of duty that led to the plaintiff's injury" but not for "a good faith, reasonable choice among valid policy alternatives, even if an unwise one," *Roberts*, 456 F.2d at 830. Although the supervisors had taken no formal action whatsoever to implement their statutory duty to supervise the jail farm, they were ruled not liable therein because their reliance on the expertise of the county farm superintendant, by acquiescing in his use of the trusty guards, was deemed reasonable.

In *Bryan v. Jones*, supra, the plaintiff sought damages for deprivation of liberty due to his incarceration for more than a month after the district attorney had dismissed charges, despite plaintiff's repeated inquiries to jail personnel. Although the court clerk had promptly notified the sheriff of plaintiff's dismissal, the sheriff persisted in his mistaken belief that plaintiff still had other pending charges because the committing warrant held by the sheriff was misnumbered. In weighing these facts, the court adroitly blended negligence law

[25]An addendum to this decision, *Roberts*, 456 F.2d at 835, reduces the Eighth Amendment ruling from a holding of federal liability on that ground to "a discussion of the meaning of the Eighth Amendment . . . relevant primarily in . . . [determining] that the complaint should [not] have been dismissed for failure to state a federal claim." In any case, this application of the Eighth Amendment appears to have been substantially vindicated by the "deliberate indifference" standard adopted in *Estelle v. Gamble*, supra.

with the §1983 doctrine of qualified immunity. Holding that the sheriff was prima facie liable under §1983 for intending the mere fact of plaintiff's continued confinement,[26] the court remanded the matter for determination of whether the sheriff possessed the qualified immunity for reasonable good faith. The court noted in this regard that "the degree of discretion is relevant to determining what standard of reasonableness will be used," *Bryan*, 530 F.2d at 1214, and further explained:

> "In a case such as this one where there is no discretion and relatively little time pressure, the jailer will be held to a high degree of reasonableness as to his own actions. If he negligently establishes a record keeping system in which errors of this kind are likely, he will be held liable. But if the efforts take place outside his realm of responsibility, he cannot be found liable because he has

[26]This requirement of intended factual result, imported from the underlying false imprisonment tort, is subject to question as inconsistent with federal considerations. To begin with, the statutory language of §1983 admits of no room for requiring a certain state of mind as an element of causes of action arising thereunder. (see: Respondent's Brief, supra, at p. 17). Moreover, although this required intent be limited in scope, any compatibility thereof with federal policy is purely coincidental. At most, this requirement, in disqualifying some claims, coincides with a general federal interest in limiting the influx of §1983 litigation. However, this effect of said requirement falls easily into cross-purposes with the particular aims of this civil rights statute to deter unconstitutional conduct and compensate constitutional harm. A variation of the facts considered in *Bryan* illustrates such cross-purposes: this intent standard would have insulated the sheriff from liability if he had promptly ordered his subordinates to release the plaintiff but, due to his negligent establishment of error-ridden procedures for effectuating the release of prisoners, this release order was lost or mislaid during transmittal down a chain of subordinates and plaintiff consequently was not released for another month.

acted reasonably and in good faith." *Bryan*, 530 F.2d at 215.[27]

This emphasis on the managerial character of the duties of modern sheriffs is further focused by the explanation, *Bryan*, 530 F.2d at 1217 (Brown, Chief J. concurring) that the sheriff can avoid liability for mistakes by establishing "a system that is reasonably watertight, that makes the functionaries check all sources of possible releases of prisoners, and a system for collecting this information and transferring it to the supervisors".

Questions concerning other information-gathering administrative practices were considered in *Dewell v. Lawson*, supra, in which the plaintiff had been arrested for public drunkenness when found wandering through the streets in an acute diabetic condition, following which plaintiff was incarcerated for four days until he lapsed into a coma, the jail personnel having been untutored in diabetic symptoms and also unaware of the all points bulletin for plaintiff as a missing person which his family had promptly caused to be issued. Relying on the Eighth Amendment, plaintiff sued the police chief for negligent failure to establish procedures advising jail personnel of such all points bulletins, to train such personnel in detecting diabetic symptoms, and to provide medically skilled staff for diabetic prisoners. The court ruled that a §1983 claim was stated by these allegations because

[27]Defendants' statement that *Bryan* limits *Whirl v. Kern*, supra (Appellant's Brief, p. 18, n. 26) is misleading. *Whirl* involved the similar facts of a prisoner languishing in jail for nine months after his case had been dismissed because the sheriff inexplicably failed to process a list of dismissed cases supplied by the court clerk. *Whirl* ruled identically to *Bryan* in deeming the sheriff to be prima facie liable, and then expressly invoked federal policy to insulate the sheriff from liability if such errors be discovered within a reasonable time. *Bryan* departs from *Whirl* only in differently defining the reasonableness requisite for such immunity, and in further conditioning immunity upon the presence of subjective good faith.

the alleged negligence of the police chief "in not supervising his subordinates" could amount to a sufficiently shocking or arbitrary "failure to procure urgently needed medical attention . . . [to] amount to cruel and unusual punishment," *Dewell*, 489 F.2d at 881-882.[28]

Similar decisions deal with other prison administrative practices. In *Wright v. McMann*, supra, the court upheld an award of damages under §1983 against a prison warden for failing to rectify the array of inhumane conditions existing in disciplinary isolation cells. Although the warden had not personally committed plaintiff into isolation, enough suggestive information filtered back to the warden to give him cause at least to suspect the conditions to which inmates were being subjected by this disciplinary practice. The court thus ruled that the warden "knew or should have known that [plaintiff] was being forced to live in [unconstitutionally inhumane] conditions", *Wright*, 460 F.2d at 135.[29] In *Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974), the court ruled that a valid §1983 claim for damages could be stated in relation to an "unreasonable continuation of a widespread prison lockup

[28]The possibility of a similar systematic deficiency is noted in *Estelle v. Gamble*, supra, 50 L.Ed.2d at 264 (Stevens, J. dissenting opinion): "[I]t is surely not inconceivable that an overworked, undermanned medical staff in a crowded prison is following the expedient course of routinely prescribing nothing more than pain killers when a thorough diagnosis would disclose an obvious need for remedial treatment."

[29]The court went on to give this response to the contention by defendant therein that capable personnel would be deterred from taking prison jobs if the damage award were upheld, *Wright*, 460 F.2d at 135: "We are not moved by the suggestion that if we uphold liability today competent people tomorrow will refuse to become superintendants . . . In the unlikely event that a prospective superintendant in fact turns down an offer for fear of personal liability, we think that the position is probably better filled by someone determined to supervise the facility so as to prevent the type of inmate treatment giving rise to this lawsuit." Defendants herein raise the same contention (Petitioners' Brief, p. 16). Dubious as to supervisory officials, the contention may have some merit as to subordinate prison personnel (see p. 49, infra).

after the termination of an emergency" where a prolonged "deprivation of hygenic necessities, writing materials, work opportunity, [or] . . . access to counsel and church services" could be shown to result from "*such a degree of neglect* or malice . . . as to deprive [the prison warden] of official immunity for merely erroneous action," *Hoitt*, 497 F.2dat 601, (italics supplied).

In *Brown v. United States*, supra, the court undertook a negligence analysis which recognized institutional limitations to such supervisorial liability. The §1983 claim therein involved sought damages from the sheriff and head jailer due to two assaults which plaintiff sustained while incarcerated in defendants' concededly overcrowded and understaffed jail. Although uncertain as to the degree of negligence for which §1983 defendants may be liable, the court averted any need to decide this question by weighing the circumstances therein. Pointing to defendants' repeated efforts to obtain help from responsible agencies in alleviating the substandard jail conditions which had obviously contributed to the assaults, the court ruled:

> "Given the limited means and facility they had at their disposal it appears that both [defendants] . . . exercised all care one could reasonably expect of them . . . To the extent that [defendants] may have had a duty to do something more than administer an inadequate facility as best they could, we find that they discharged that duty." *Brown*, 486 F.2d 287-88, 288, n. 4."

Where circumstances disclose that a contributing cause to constitutional harm produced by subordinate officials consists in the failure by the officials charged with supervising such subordinates either to provide reasonable training, or to discipline or control particular subordinates for whom reason exists to suspect unconstitutional conduct, negligence principles indicate that such supervisory officials should be liable in damages for the constitutional harm to which they thereby contributed. Thus in *Carter v. Carlson*, supra, where police

officers arrested plaintiff without probable cause and beat him unnecessarily with brass knuckles, plaintiff included supervisory officers in his §1983 damages claim, alleging that they failed to train, instruct, and supervise the arresting officers as to probable cause criteria for arrest and the limits of permissible force in effecting arrests. Acknowledging that a potentially valid claim was thus stated against the supervisory officers, the court remanded this claim to develop more specific evidence concerning the character and distribution of training and supervision duties. Similarly in *Beverly v. Morris*, supra, the court sustained a verdict awarding damages against a police chief for failure properly to train and supervise an auxiliary officer who had arrested and then beaten plaintiff with a blackjack. Deeming this claim to be sufficient since founded in negligence of the police chief himself, the court also held the verdict fully supported by "evidence [which] shows a complete absence of any supervision or training of the auxiliary police officer," *Beverly*, 470 F.2d at 1357. And in *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976), where the black plaintiff had been unlawfully arrested and physically abused by several police officers, the court deemed valid the §1983 damages claim against the police chief, mayor, and members of a police review committee, alleging that these officials possessed supervisory duties under local law which included controlling or disciplining police misconduct, and that they "knew or should have known of . . . prior violent misconduct against blacks" by one of the arresting officers, in that complaints to this effect had previously been brought to the attention of these supervisory officials, *Sims*, 537 F.2d 831. In harmony with the foregoing decisions, *Jennings v. Davis*, supra, acknowledged that the police chief and other supervisory officials possessed affirmative duties "to prudently select, educate, and supervise police department employees" *Jennings*, 476 F.2d at 1275, but ruled insufficient the allegations therein that these supervisory duties had been negligently breached when a civilian clerk at the police station had ridiculed plaintiff and subjected her to an unnecessary

personal search following her arrest on a minor traffic charge. To hold these supervisory officials thus accountable for such "an isolated, spontaneous incident [would be] . . . beyond reason," *Jennings*, 476 F.2d at 1275.

The lower federal courts have been less ready to impose monetary liability on subordinate officials where their negligent conduct infringes constitutional interests. These judicial decisions tend to confine such liability to official conduct which exposes individuals repeatedly to the same risk, which entails a more aggravated degree of risk, or which involves risk of particularly serious forms of constitutional harm.

In *McCray v. Maryland*, supra, the court upheld a §1983 action by a prisoner for damages from a court clerk who negligently impeded the filing of plaintiff's petition for post-conviction relief. The court refused to fashion a more lenient liability standard, pointing out that the common law generally exposed ministerial conduct to liability for negligent failures to perform.[30] In further justification of this negligence standard, the court deemed it not unduly inhibitory in that court clerical personnel were already exposed to fines under a state law directed at such neglect, and stressed the strong constitutional interest therein jeopardized:

> "Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom door can be hermetically sealed against him by a functionary who, by refusal or neglect, impedes the filing of his papers?" *McCray*, 456 F.2d at 5.

[30]The court added that qualified immunity under §1983 might be extended to ministerial officials who infringe constitutional rights while discharging statutory duties. This caveat seems to suggest some degree of immunity akin to the *Pierson* immunization of police officers making arrests under statutes they reasonably believed valid, but later held unconstitutional.

In *Jenkins v. Averett*, supra, the court upheld §1983 liability of a police officer who, catching up to an innocent youth after chasing him with gun drawn, accidentally shot the youth as the officer lowered his gun. The court deemed plaintiff's Fourth Amendment rights to have been violated by this arbitrary infliction of physical injury. In rejecting "the spectre raised in the dissent that our opinion contemplates a constitutional remedy for all state-perpetrated negligence," the court emphasized both that the conduct of the officer amounted to wanton or gross negligence rather than simple negligence or inadvertance, and that the injury was inflicted "in the course of [the officer's] attempt to apprehend the plaintiff," *Jenkins*, 424 F.2d at 1232.[31] In *Williams v. Vincent*, supra, the court considered the alleged negligence of

[31]By stressing that the injury was inflicted in the course of the officer's attempt to apprehend plaintiff, *Jenkins* appears to limit Fourth Amendment violations cognizable as §1983 damage claims to injury-causing actions which, otherwise qualifying, arise from an underlying course of official conduct directed at the plaintiff. Akin to the prima facie requirement of intentional confinement in *Bryan v. Jones*, supra, in requiring a minimal underlying focus on the plaintiff, this requirement of underlying purpose screens from §1983 the claims of such negligence victims mentioned in the *Jenkins* dissent as bystanders and passing motorists injured during police action, in that such peripheral plaintiffs contrast with the *Jenkins* youth in never being the intended object of the underlying official course of action. The permieter thus drawn around cognizable §1983 claims by this underlying purpose test resembles the prevailing common law immunity doctrine limiting cognizable claims against public officers for their ministerial negligence to plaintiffs possessing "special, direct, and distinctive interest[s]" in performance of the involved ministerial duties. 67 C.J.S., *Officers*, §1277, p. 422-23. The within claims meet this underlying purpose test in that the underlying course of mail regulating conduct by all defendants was intended to affect plaintiff together with all other state prisoners. In contrast to this limited notion of underlying purpose as a parameter for at least some §1983 claims, the more encompassing requirement of intent which defendants insist should delimit §1983 claims would extend to the consequences of the particular injury-causing act: a §1983 claim would thus exist only where the state official desires or is substantially certain that his action will inflict the constitutional harm in question.

a prison guard who, while in the company of a prisoner, failed to protect him when the latter was attacked by another inmate. Holding that this isolated omission by the guard could subject him to monetary liability under §1983 only under "circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control," *Williams*, 508 F.2d at 546, the court applied these standards to observe that the claim therein lacked needed allegations that this guard either had a history of similar behavior or, following his reflexive retreat when the attacker first struck, the guard simply stood by and allowed the attack to continue.

In *Jenkins v. Meyers*, supra, the court reached a holding which curtailed the negligence liability of subordinate prison officials by denying their accountability for inadvertance as to the factual results of their conduct.[32] Denying liability for

[32]In excluding inadvertance as a basis for §1983 liability, *Jenkins* is in seeming conflict with *McCray v. Maryland*, supra. *McCray* never specified what conduct of the court clerk therein amounted to negligence, and hence the holding therein appears equally to apply whether the clerk inadvertantly failed to file plaintiff's pleading, or whether the nonfiling was intended due to some negligent misunderstanding of the surrounding circumstances. *McCray* thus imposes liability on all negligent conduct, while *Jenkins* reaches only some negligence. A reconciliation of these differing standards might be ventured by contrasting the constitutional interests respectively involved: while both decisions concerned legal correspondence, the court clerk occupied a more critical spot than the prison guards, being gatekeeper to the final commmon destination of all prisoner legal efforts. This pivotal significance of the court clerk's conduct for effective access to the courts, emphasized in *McCray*, justifies imposition of unrestrained negligence liability both for compensatory reasons as well as to give court clerks maximum incentive to evolve prudent practices in processing incoming pleadings. However, apart from any such reconciliation of *Jenkins* with *McCray*, respondent elsewhere questions this requirement adopted in *Jenkins* that the factual result be intended (See footnote 26, supra, and footnote 33, infra).

prison officials who failed to mail a prisoner's transcript to his attorney, but instead inadvertantly enclosed the transcript with another prisoner's outgoing letter, to a relative, the court voiced concern, *Jenkins*, 338 F. Supp. at 390, that

> "to apply the tort law en masse to §1983 . . . would convert every minor mistake, especially in the milieu of a prison, into a violation of §1983. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable."

The court factually distinguished the unjustifiably prolonged incarceration in *Whirl v. Kern*, supra, as involving "a certain threshold congnizance of the act being performed, albiet an innocent one," *Jenkins*, 338 F. Supp. at 389. The court declared itself to be ruling out liability only in

> "cases where there is a deprivation of a constitutional right but the act bringing about that violation was an unconscious one, a pure mistake, and the factual as well as the legal result were unintended . . ." *Jenkins*, 338 F. Supp. at 389.[33]

[33]The *Jenkins* court confirmed that it considered *Whirl* to govern the result therein by further noting that the defendants therein would have been deemed liable if, as in *Whirl*, they had intended purely the factual result by "intentionally mail[ing] plaintiff's transcript to a wrong address thinking it was perfectly legal to do so and . . . not a denial of [the constitutional right of access]," *Jenkins*, 338 F. Supp. at 389. This adherence to *Whirl* parallels the fact that both decisions are similarly riveted to the underlying common law: just as the *Whirl* requirement of intended factual result is linked to false imprisonment, the corresponding *Jenkins* requirement mirrors the tort of conversion. Cf. Prosser, supra, §15, p. 83. As respondent has argued as to the factual intent required by both *Whirl* and *Bryan* (footnote 26, supra), importing this requirement from the common law contravenes the statutory language of §1983, and risks running afoul of other federal considerations. Indeed, the "threshold cognizance" required in *Jenkins* is singularly inappropriate in (at least) two respects. Firstly, in ironic contradiction to the policy concern of *Jenkins* (quoted in text hereinabove) with averting a "high standard of strict liability" for prison officials, *Jenkins* imposes this very standard to the extent of following conversion law in

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In similar vein to *Jenkins v. Meyers*, supra, the court in *Bonner v. Coughlin*, supra, denied liability for harm inadvertantly caused by prison officials. The defendant prison guards therein had unintentionally left open the door to

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conceding liability for innocent mistakes by prison officials as to the legal effect of their actions. Cf. Prosser, *ibid.* Such imposition of strict federal liability is indeed devoid of any prophylactic value in encouraging the adoption of prudent investigation procedures where constitutional rights are concerned, and flies in the face of the reasonableness standards adopted in *Whirl* and *Bryan* for information processing by sheriffs as to the legal effect of their continued incarceration of inmates, as well as in *Wood v. Strickland*, supra, for inquiry by school officials into established constitutional standards bearing on the legality of their contemplated actionss. Secondly, the *Jenkins* "threshold cognizance" standard distinguishes factual results actionable under §1983 from those that are not in a manner little relevant to the deterrence and compensation functions of this civil rights statute. While it may concededly be argued that this *Jenkins* standard serves deterrence since the threat or imposition of monetary liability has more deterrent effect on action where at least the factual result is intended than on inadvertant action, this argument seemingly possesses weight only when inquiry is limited to the specific injury-causing act or omission. The conclusion melts away upon scrutiny of the surrounding course of conduct. A prison official who commits an inadvertant mailing error due to his correctably careless practice in processing prisoner mail would respond to liability by elevating his degree of care in handling mail far more predictably than would an official who, despite his generally impeccable mail processing, makes a good faith albiet intended mailing error. Indeed, a distinction between forms of negligence drawn in terms of the deterrent purpose of §1983 would undoubtedly put more priority on rendering liable any chronically careless prison official, because of the comparatively widespread harm risked by his repeated mailing errors, whether the errors be inadvertant or intentional, than the official whose mailing errors of any sort are infrequent aberrations from his usual prudent practice in handling prisoner mail. The *Jenkins* standard is also patently irrelevant in weighing, from the standpoint of the compensatory purpose of §1983, the magnitude of constitutional harm caused: intended errors may block letters of minor import as easily as critically important mail may fall victim to inadvertant error.

plaintiff's cell as they departed after completing a security search inside, following which plaintiff's trial transcript was stolen from the cell. The court ruled alternatively that "the negligence of the guards which caused the loss of [plaintiff's] transcript was not a State deprivation of property without due process . . . nor action 'under color of state law' under §1983," *Bonner*, 545 F.2d at 567. As to the first stated ground, the court concluded that plaintiff's reliance on the "substantive aspect of due process" amounted to an "ex proprio vigore extension [thereof] . . . that the Supreme Court rejected in [*Paul v. Davis*]," *Bonner*, 545 F.2d at 567. The court concluded, in discussing its second stated ground, that "any causation between the negligence of the prison guards . . . [and plaintiff's] transcript loss was insufficient to satisfy §1983.[34] In sweeping dicta, the court also speculated

[34]This second ground of the court's ruling untenably intertwines the disparate concepts of state action, color of law, and causation. Initially observing that state action ended "when the guards left the cell," and that "color of law" was lacking because the guards "neither encouraged nor condoned the taking of the transcript," the court only then concluded [quote appears in text hereinabove] that there was no sufficient causal link between the guards' negligence and the transcript theft. However, the concept of "state action" does not directly concern causation. Involved in determining the applicability of Fourteenth Amendment guarantees to private action, "state action" instead concerns the quantum and character of supportive involvement in private action by state government Cf. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). Likewise, the concept of "color of law" deals not with the consequences of conduct by state officials, but rather with whether the conduct itself is sufficiently clothed with official character to come within the purpose of §1983. Cf. *Monroe v. Pape*, supra. *Bonner* should therefore have considered the sufficiency of the link between the guards' conduct and the transcript theft purely in terms of the causation required by §1983. Moreover, even insofar as *Bonner* expressly addressed the causation question, the court inappropriately supported its conclusion that the guards' actions were insufficiently linked to the ensuing theft by reciting that "the guards' actions were [n]either intentional [n]or in reckless disregard of [plaintiff's] constitutional rights," *Bonner*, 545 F.2d at 567. It is clear that, in
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that negligence may be generally inappropriate as a basis for §1983 claims. However, the court firmly concluded only that §1983 should be inaccessible as to "negligent conduct,

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determining what harm is sufficiently caused by official conduct, the official's state of mind is not a defining criterion. (see Respondent's Brief, supra, at p. 17) Cf. *Bonner*, 545 F.2d at 572 (Swygert, J. dissenting). Further, the apparent reference in this supporting statement to the standard from *Wood v. Strickland*, supra, as to required knowledge of constitutional rights, fundamentally misconstrues that standard. Said standard addresses the degree of an official's awareness of the *legal consequences* of his actions, not the *factual result* thereof, and specifies the boundary between immunity and liability to be the *unreasonable* ignorance of constitutional rights, not the *reckless* disregard thereof. *Wood*, 420 U.S. at 3222. *Bonner* should have pursued a causation analysis geared to the *Rizzo* requirement that some "direct responsibility" or "affirmative link" be shown between the official, conduct and the ensuing harm before liability is imposed. *Rizzo*, 423 U.S. at 371, 376. Such a causation analysis calls for closer scrutiny of the surrounding circumstances than undertaken in *Bonner*. Inquiry should have been made into what orders or other locally prescribed duties the guards possessed regarding the securing of cells after searching therein, as well as how pronounced or foreseeable was the risk under the circumstances that another prisoner would happen by and exploit the opportunity posed by this unlocked cell to steal the transcirpt. Sufficiently related to the requirement set forth by *Rizzo* to offer suggestive guidance, standard tort precepts indicate the following approach for inquiry into whether harm proximately resulted from negligent conduct where the criminal act of a third person intervened: "Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it . . . It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent," Restatement, Torts, Second, §302B (*Risk of Intentional or Criminal Conduct*), §449 (*Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent*).

without more, resulting in an injury to a property right." *Bonner*, 545 F.2d at 568, n.8. Accordingly, the court stated concerning the within decision below: "If *Navarette v. Enomoto* does concern mere negligence, we respectfully disagree. However, *Navarette* apparently concerned negligent conduct resulting in the deprivation of the prisoner's 'fundamental and reasonably well defined constitutional rights'," *Bonner*, 545 F.2d at 569.[35]

C. The Conduct of the Within Defendants Should Be Governed By This Standard

In light of the foregoing immunity decisions by this court and negligence decisions by lower federal courts, the following contentions can be made concerning the liability standard

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[35]The dissent, *Bonner*, 545 F.2d at 569, 573 (Swygert, J. dissenting), recognized the need somehow to screen "the barrage of frequently insignificant prisoners' complaints" lest the federal courts become the day to day supervisors of state prison systems," proposing that the selection criteria should not consider whether the official conduct was negligent or intentional, but rather should face "the nature and extent of the hardship imposed on the inmate." Turning to the "color of law" requirement, the dissent suggested that a distinction be drawn thereunder between governmental and incidental activities of prison personnel, the former category including official conduct related to "security, discipline, and . . . a prisoner's First Amendment activities . . . *[such as] censorship of mail*," (italics supplied) and the latter involving the "providing [of] food, shelter, exercise facilities, safety measures, and a host of other incidentals," *Bonner* 545 F.2d at 575. Harm caused by official conduct in the governmental area would inherently meet the "color of law" requirement, whereas harm suffered due to conduct of incidental character could give rise to a §1983 action only if more than a single instance of simple negligence were involved.

appropriate for the within defendants in the context of their regulation of constitutionally protected prisoner mail.[36]

1. The supervisory defendants

To the extent that the conduct of the within supervisory defendants affecting the obstruction of plaintiff's mail amounted to discretionary decisionmaking, these defendants are required by the rulings in *Scheuer v. Rhodes*, supra, and *Wood v. Strickland*, supra, to have functioned in a reasonable manner. It remains to fix the degree and character of the reasonableness required before any such supervisory officials can be insulated from liability for constitutional harm caused by failure to train and direct their subordinates.

In stating that the extent of executive immunity should vary in proportion "to the scope of discretion and responsibility of the office, *Scheuer*, 416, U.S. at 247, this court evinced a policy concern for averting an excessive liability burden on higher executive officials, a concern particularly appropriate in contexts of rapid decisionmaking by high executive officials under emergency circumstances. However, this consideration should not be frozen into a "fixed, invariable rule of immunity," *Doe v. McMillan*, 412 U.S. 306, 320 (1973), which assures higher executive officials, such as the within supervisory defendants, of a comparatively broad immunity under all circumstances. Rather, as this court recognized, in *Doe*, 420 U.S. at 320, concerning official immunity at common law, the scope given immunity depends on

[36]Plaintiff shall argue in Part III, infra, that his obstructed mail was provably protected by clearly established constitutional guarantees of free expression and due process – constitutional protection of which defendants knew or reasonably should have known. It is assumed hereinabove that this argument is accepted by this Court.

> "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens."

From this flexible perspective, account should be taken herein of the fact that these supervisory defendants, in shaping and supervising a system for regulating prisoner mail, possessed time for deliberation and review which was patently unavailable to the high officials in *Scheuer*. A parallel contrast between the relatively leisurely conduct of sheriffs in relation to their jails, and the pressure faced by policemen on the beat to make quick, stressful decisions, was deemed in *Whirl v. Kern*, supra and *Bryan v. Jones*, supra, to call for signifcantly less insulation of jailers than police from liability. This consideration points toward requiring herein a higher degree of reasonableness than called for by the circumstances considered in *Scheuer*. Moreover, in terms of the above-quoted reference in *Doe* to the risk of recurring harm,[37] the reasonableness required of the state director should be comparatively stringent because of the vast range of prisoners throughout California whose constitutional mail interests are affected by his conduct concerning the within regulatory system.

Another factor influencing immunity consists in whether discretion is actually exercised. Where circumstances demand the considered exercise of discretion, but the official action or inaction is nonetheless unfounded on any deliberate choice between options, such conduct stands bereft of the policy considerations undergirding the extension of immunity to executive officials. This point is cogently made in *Scheuer*, 416 U.S. at 241-242:

[37]The law of negligence likewise considers the number of people potentially harmed in fixing the level of reasonableness required by particular conduct (Respondent's Brief, supra at pp. 23).

> "[T]he public interest requires decisions and action to enforce laws for the protection of the public . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices."[38]

Accordingly, to the extent that pertinent conduct of the within supervisory defendants concerning prisoner mail regulation is found to be nondeliberative in character despite circumstances calling for discretionary decisionmaking, a case can be made for liability without more for resulting constitutional harm. More moderately, such nondeliberative conduct should at least be measured by the same high standard of reasonableness as *Bryan* imposed on the essentially ministerial supervisory work of the sheriff therein.

In its perspective on the appropriate character of a reasonableness standard, *Bryan* displayed a sensitivity to the character of personal responsibility within modern bureaucracy which is equally appropriate herein in assessing the involvement of the within supervisory prison officials in this

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[38]The California Supreme Court reached a parallel conclusion in *Johnson v. State of California*, 69 Cal. 2d 782, 794, n.8., 73 Cal. Rptr. 240, 447 P.2d 352 (1968), when considering governmental immunity in relation to a juvenile parole officer who, without consciously weighing countervailing considerations failed to warn a foster family of the dangerous propensity of a juvenile placed with them:

> "[T]o be entitled to immunity the state must make a showing that . . . a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."

A related view is expressed in 63 Am. Jur. 2d, *Public Officers and Employees*, §289 [negligence liability for officers exercising ministerial functions even where they also possess discretionary duties].

statewide system of prisoner mail regulation. Where supervisorial responsibility includes devising or adjusting a regulatory system, the operation of which touches constitutional interests, a significant dimension of this responsibility must consist in the effectiveness of the system in avoiding undue infringement on constitutional interests while serving the legitimate ends for which it was established. Insofar as a system synchronizes essentially ministerial functions, its effectiveness on this score can simply be measured in terms of the dearth or abundance of errors trenching upon constitutional interests. Procedures for the physical processing of mail can thus appropriately be assessed in terms of the frequency with which letters are inadvertantly lost. Insofar as a system instead coordinates discretionary decisionmaking by subordinate officials, assessing effectiveness of the system is a more subtle task which should focus on reasonableness of supervisory effort to minimize systemic deviation of regulatory decisions from constitutional criteria. Such considerations herein may reasonably have required written guidelines (and training insofar as necessary) explaining established constitutional criteria, together with some procedure for administrative review of censorship decisions by subordinates.[39]

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[39]If the state director's bulletin of August 10, 1972 (see footnote 8, supra) is proved to constitute the first effort by this defendant to apply constitutional criteria generally to prisoner mail censorship, an issue will thus be posed of whether said defendant conducted himself reasonably in delaying until that date in taking any affirmative step to implement these established criteria. Relevant to this issue in terms of institutional capacity for prompt adjustment of prisoner regulations was the state director's prompt issuance of revised regulations (R 146-147) in the wake of *Johnson v. Avery*, 393 U.S. 493 (1969): "on March 19, 1969, less than a month after the *Johnson* decision was rendered, the Director's Rules were altered in an effort to conform to the constitutional requirements there enunciated," *In re Harrell*, 2 Cal. 3d 675, 684, 87 Cal. Rptr. 504, 470 P.2d 640 (1970). The issue as to reasonableness of such delayed response to clear constitutional developments could also invoke inquiry into whether the within supervisory defendants were sufficiently aware that subordinates were

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2. The subordinate defendants

It appears clear that subordinate prison officials should be held to some degree of reasonableness in their conduct before they can be accorded immunity under §1983. Where such officials engage in discretionary decisionmaking, this conclusion fairly follows from the limits which this Court thus imposed on police officers in *Pierson v. Ray*, supra, and on school administrative officials in *Wood v. Strickland*. As to the ministerial functions performed by such officials, this conclusion is strongly supported by the prevailing common law view that officials engaged in ministerial conduct should be liable for their negligent breaches of duty to persons to whom the duty is owed, 67 C.J.S., *Officers*, §125, 63 Am. Jur. 2d, *Public Officers and Employees*, §292, or who at least

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making constitutionally aberrant censorship decisions to require reasonably that the supervisory defendants should have earlier taken remedial action. Any such inquiry should consider these supervisory defendants to possess some affirmative responsibility to monitor the functioning of their system for mail regulation as a logically necessary concomitant of their involvement in shaping if not indeed erecting this system. Any lesser duty would bear the foul fruit of encouraging higher executive officials to direct that coordinated forms of subordinate activity be undertaken, and then, by isolating themselves from feedback on the execution of such directives, sidestep responsibility for all constitutional harm from any subordinate action that departs foreseeably from the coordinated activity as originally conceived. Herein, such system-engendered error could include negligent misinterpretation of state regulations (or rules of the particular prison) by decision-making subordinates, as well as their ignoring of applicable constitutional standards fostered by the continued privilege-not-right approach which existing state regulations took concerning prisoner mail interests. An affirmative duty to check for occurrence of such subordinate aberration can be distinguished from the more limited responsibility affirmed in *Sims v. Adams*, supra, and related cases (see pp. 34-36, supra) to rectify subordinate misconduct only when the supervisory officials are reasonably notified thereof by circumstances of which they are aware. The latter forms of subordinate misconduct are not intrinsically foreseeable, whereas the former are.

possess a "special, direct, and distinctive interest," in the performance thereof, 67 C.J.S., *Officers*, §127, p. 422-423.

In determining what degrees of reasonableness may appropriately be required in particular contexts, it must be acknowledged that the lower federal courts have frequently been sparing in their imposition of liability on lower prison officials. This judicial view concededly finds support in the fact that such lower officials potentially face a particularly broad range of liability exposure due to their intensive daily contact with virtually every aspect of prisoners' lives. However, to the extent that such considerable potential liability is determined to impair recruitment and retention of these necessary public functionaries or to be inappropriate for other policy reasons, a sufficient judicial solution is at hand short of engrafting an artificial requirement of intentionality onto the language of §1983. Negligence precepts offer the perspective that, given the undisputed social utility of the conduct of lower prison officials, a less stringent standard of reasonableness would be appropriate. The analysis undertaken in *Williams v. Vincent*, supra, indicates that such a reduced standard can be implemented by limiting liability to ordinary negligence accompanied by a history of similar behavior, and to isolated conduct only where more aggravated negligence is involved: in either case, the harm thereby risked weighs more heavily in the scales.

At the same time, it would appear inappropriate to reduce the negligence standard for constitutional harm caused by lower prison officials where, as herein, they face liability under state law for harm caused through ordinary negligence to prisoner interests recognized by common law. Cal. Gov. Code §844.6(d). Such state liability takes much of the force from the foregoing policy consideration that §1983 liability for negligently infringing constitutional interests of prisoners will dissuade people from seeking or remaining in prison employment. Conversely, there is no merit to defendants' suggestion (Petitioners' Brief at p. 14, n.21) that this state remedy itself sufficiently protects prisoner interests from

negligent infringement, thereby rendering superfluous any §1983 liability for negligent infringement of constitutional interests. Apart from the fact that sufficiency of any state remedy cannot defeat recourse to §1983 for relief, *Monroe v. Pape,* supra, it is further clear that constitutional interests differ considerably from common law interests. As observed in *Monroe,* 365 U.S. at 196 (Harlan, J. concurring):[40]

> "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right . . . even though the same act may constitute both a state tort and the deprivation of a constitutional right."

[40]Further observing that, apart from the "purest coincidence", a state remedy for an injury possessing constitutional dimensions will likely be "far less than what Congress may have though would be fair reimbursement for deprivation of a constitutional right," *Monroe,* 365 U.S. at 196, n.5 (Harlan, J. concurring), Judge Harlan gave these examples of his point:

> "There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land."

The within facts are akin to the preceding examples. Plaintiff's obstructed letters possess considerably more significance when viewed as thwarted attempts to exercise First Amendment rights than when seen only as personal property wrongfully converted or negligently mishandled. Moreover, the potential gamut of wrongdoing is considerably broader herein than would be the case under the state remedy. Whereas negligence in the latter context refers to carelessness in physical handling of the letters, the within action encompasses careless dealing with the constitutional interests which are recognized to infuse these letters. These interests protect the letters not only from careless physical mishandling, but further from unreasonable censoring criteria careless denial of procedural remedies and the like (see Part III of Respondent's Brief, infra).

The stature of the constitutional interest involved is also a factor in determining stringency of the reasonableness standard to which lower prison officials should be held. Whatever may be said of property rights and other lesser constitutional interests, where fundamental First Amendment freedoms are implicated as herein, considerable weight must be given the prisoner's interest in redress. Considered to possess "transcendant value," *Speiser v. Randall,* 357 U.S. 513, 526 (1958), free expression retains similar policy significance behind prison walls, *Sostre v. McGinnis,* 442 F.2d 178, 199, *en banc,* (2nd Cir. 1971)

> "The values commonly associated with free expression—an open, democratic marketplace of ideas, the self-development of individuals through self-expression, the alleviation of tensions by their release in harsh words rather than hurled objects—these values that we esteem in a free society do not turn to dross in an unfree one."

These values are pivotal to rehabilitation, which "is a moral and intellectual process," *Brown v. Peyton,* 437 F.2d 1228 (4th Cir. 1971). Similarly, the procedural protections intrinsically surrounding free expression—protection against exercise of overly broad censorship discretion, and assurance of opportunity for administrative review of decisions preventing expression—likewise possess recognized value inside prison: "[w]ith some [prisoners], rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent,"[41] *Wolff v. McDonnell,* 418 U.S. 539, 563 (1974). As similarly observed in *Clutchette v. Procunier,* 510 F.2d 613, 615, (9th Cir. 1975), rev'd on other grnds (sub nom *Enomoto v. Clutchette*), 425 U.S. 308 (1976):

> "Any deprivation of the small store of 'privileges' accorded a confined or relatively confined group causes a far greater sense of loss than a similar deprivation in a

[41]For authority supporting existence of these procedural protections, see p. 65, infra.

> free setting . . . Deprivation of the more highly valued privileges can have as debilitating an effect on the amenability of a prisoner to rehabilitation as the loss of some good-time credit for a period of isolation from the general prison population."

In light of these weighty policy considerations underlying constitutionally protected prisoner correspondence, negligent interference with such correspondence should be compensable under §1983 whether or not repeated or aggravated.[42]

III.

DEFENDANTS KNEW OR REASONABLY SHOULD HAVE KNOWN THAT THEIR CONDUCT WOULD VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

In *Pierson v. Ray*, supra, 386 U.S. at 555, this Court required for immunity of a police officer who makes an arrest under a statute later held unconstitutional that the officer must have "reasonably believed [the statute] to be valid". Similarly in *Wood v. Strickland*, supra, 420 U.S. at 322, this Court held other executive officials to the requirement that they know the clearly established constitutional rights of persons under their charge, and accordingly deemed such

[42]While virtually no deterrent purpose is served by allowing liability for isolated inadvertance, the considerable compensatory interest to which the foregoing policy considerations attest should sufficiently justify such exposure to §1983 liability, at least in jurisdictions as herein where similar liability exists under state law. Of course, the value of deterring constitutional harm also arises where the negligence is spawned by a correctably careless habitual or customary course of conduct. From evidence thus far elicited herein, it appears that plaintiff's twenty-five obstructed letters may well have fallen victim to such ongoing careless conduct by defendants, whether personal habit or formal practice.

officials subject to monetary liability for conduct which the official "knew or reasonably should have known . . . would violate [these] constitutional rights". Defendants herein contend that they cannot be liable under these standards because in 1971 and 1972 there was "no fundamental right of a prisoner to correspond as part of a first amendment right of free expression or otherwise". (Petitioners' Brief, p. 19). To support this contention, defendants argue that decisions within the Ninth Circuit affirming such a right came later, that a number of other lower federal court decisions holding against such a right existed at the time, and that the later decision by this Court in *Procunier v. Martinez*, 416 U.S. 396 (1974), in any case affirmed only the first amendment rights of nonprisoner correspondents. Defendants further argue that no constitutional right becomes clearly established within the meaning of the foregoing standards until first articulated by this Court. These arguments by defendants fundamentally misconstrue the meaning of the foregoing *Pierson* and *Wood* standards as well as the state of applicable decisional law by 1971-72.

In determining whether a point of constitutional law is sufficiently established within the meaning of the *Pierson* and *Wood* standards, lower federal and state court decisions can be relevant as well as decisions by this Court. In *Cox v. Cook*, 420 U.S. 734 (1975), where an inmate sought damages under §1983 from state prison officials for thrice putting him in solitary confinement between 1968 and 1970 without according him any procedural due process, this Court held that its decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974) did not aid plaintiff's effort to show that defendants failed to meet the *Pierson* standard because *Wolff* was decided after the disciplinary actions in question and in any case possessed no retroactive effect. *Cox* also considered possible relevance under *Pierson* of the federal court decisions in *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971) and *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966), from the respective district and circuit in which the incidents therein took place.

Landman v. Royster, supra, was similarly ruled out because relevant only "to discipline determinations made in the Eastern District of Virginia after [said] decision," *Cox*, 420 U.S. at 736, and *Landman v. Peyton,* supra, was excluded from consideration because the "uncertain dicta" therein was insufficient to establish "a rule binding on [defendants]," *Cox,* 420 U.S. at 737, n.3. In *Knell v. Bensinger,* 522 F.2d 720 (7th Cir. 1975) the court considered possible monetary liability under §1983 of prison administrators for denying mail privileges and access to counsel to inmates in disciplinary isolation during a two week period in late 1971. Ruling that the foregoing *Wood* standard properly "applies equally to the official conduct of correctional administrators,"[43] *Knell,* 522 F.2d at 724, observed that while decisions of this Court as well as lower federal court decisions had, by late 1971, firmly established the prisoner right to reasonable and effective access to the courts, a showing of "arbitrary and invidious discrimination or caprice" was generally required in 1971 before courts would intervene. *Knell* concluded by pointing to the decision in *Hatfield v. Bailleaux,* 290 F.2d 632 (9th Cir. 1961), upholding the short term stoppage of communication with isolation prisoners, as a decision upon which the *Knell* defendants could reasonably have relied. In *Johnson v. Anderson,* 420 F. Supp. 845 (D. Del. 1976), the court similarly applied the *Wood* standard to a state prison

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[43]In thus ruling that the *Wood* standard applies to prison administrators, *Knell,* 522 F.2d at 725, ventured these policy considerations:

> "[T]he Supreme Court sought to insure that careless disregard or negligent ignorance of clear constitutional rights and duties would not be insulated from liability . . . Accordingly, in the context of prison administration, while the importance of administrative experimentation and discretion in the development of correctional policies and disciplinary procedures has been noted [citations], in exercising their informed discretion, officials must be sensitive and alert to the protections afforded prisoners by the developing judicial scrutiny of prisoner conditions and practices."

superintendant, although with the caveats that the responsibilities of such an official "differ in many ways from the responsibilities of these defendants [in *Wood* and *Scheuer*]", *Johnson,* 420 F. Supp. at 847, and that prison superintendants are not "required to seek legal advice about every aspect of prison life," *Johnson,* 420 F. Supp. at 848. Therein dealing with a §1983 damages action by prisoners put in disciplinary isolation during 1973 without any hearing, the court relied on evidence that the prison superintendant had in fact obtained advice from the attorney general on other aspects of plaintiffs' disciplinary confinement to rule that said defendant was inexcusably ignorant of a decision requiring such hearings issued from that circuit, *Gray v. Creamer,* 465 F.2d 179 (3rd Cir. 1972), nine months previously. Also see: *Picha v. Wielgos,* 410 F. Supp. 1214 (N.D. Ill., E.D. 1976) [constitutional decision by Illinois Supreme Court considered in determining established rights for purposes of *Wood* standard].

It is equally clear that in determining what law was settled at a particular time, potentially relevant constitutional decisions which then existed should be deemed to possess applicability reasonably beyond their own particular facts. Thus, in *Anderson v. Nosser,* 438 F.2d 183 (5th Cir. 1971), the court held to be a jury matter the *Pierson* question of whether the arresting officers therein reasonably knew of the unconstitutionality of the parole ordinance therein involved, which gave the police unlimited discretion to deny permits, where "numerous judicial decisions prior to 1965 had made it clear that statutes which conferred unbridled discretion upon a public official to grant or deny the exercise of expressive activity were invalid," *Anderson,* 438 F.2d at 195. Similarly, in *Slate v. McFetridge,* 484 F.2d 1169 (7th Cir. 1973), the court considered possible §1983 liability of Chicago park district officials for failure promptly to process plaintiffs' request for a large park to hold a political rally during August, 1968. In applying the *Pierson* standard, the court cautioned, *Slate,* 484 F.2d at 1174:

> "[C]ourts should be wary of too broadly construing cases which set down the law of times past, particularly where new cases have widened the scope of doctrine earlier announced . . . Thus, the narrow reading by a public official of a case on constitutional law must be upheld unless patently unreasonable and without arguable support in logic or policy. Nevertheless, we cannot fail to recognize that any case has boundaries of fair application which go beyond situations presenting the facts squarely before the deciding court on the occasion of decision. *Every decision is possessed of a penumbra of analogies.*" (italics supplied).

The court concluded that, while more directly applicable decisions by this Court starting in 1968 "came too late to inform the defendants of the duty they impose," *Slate*, 484 F.2d at 1175, the defendants therein were sufficiently notified by the decision in *Freedman v. Maryland*, 380 U.S. 1 (1965) that due process required prompt resolution of the permit request. The court reasoned as to the *Freedman* decision, which delineated procedural strictures for state censorship of obscene movies, that "[f]ew would argue . . . that the protection of speech and assembly in the context of political parades and demonstrations is an object no less sacred to the First Amendment than the protection of the cinema from the censor," *Slate*, 484 F.2d at 1176. In *Seals v. Nicholl*, 378 F. Supp. 172 (N.D. Ill., E.D. 1973), the court relied on *Slate* in resolving a §1983 damages claim based on a procedural due process violation by the police in sending ineffectual notice to the home of an incarcerated automobile owner regarding a confiscation proceeding for his vehicle. While this court had issued a ruling precisely on point, in *Robinson v. Hanrahan*, 409 U.S. 38 (1972), said decision occured only after the events therein in question. However, the court concluded that "[n]o reasonable interpretation of [*Robinson*] would allow a conclusion that it establishes any new or more severe standard for due process," *Seals*, 378 F. Supp. at 178, and that the defendants still were sufficiently apprised of their notice obligation by the decisions of this

Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, (1950), requiring reasonably effective notice in any proceeding which is to be accorded finality," and *Walker v. Hutchinson* 352 U.S. 112 (1956), applying the *Mullane* notice standard to condemnation proceedings. In similar vein, it was observed in *Picha v. Wielgos*, supra 410 F. Supp. at 1219, as to the *Wood* standard, that

> "it appears that law can be settled without there having been a specific case with identical facts which was decided adversely to the [defendant] officials. There is a limitation to the notion that [defendant] officials can have one 'free' constitutional violation before they are liable for ignoring constitutional rights that arise in each unique factual setting."

Therein inquiring into what settled constitutional standard applied to an allegedly illegal search of a high school student by school officials, the court found applicable the standards enunciated by this court in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Camara v. Municipal Court*, 387 U.S. 523 (1967), both said rulings involving searches motivated, similarly to the school search therein, by something other than the prospect of obtaining evidence of crime. In *Mukmuk v. Comm'r of Department of Correctional Services*, 529 F.2d 272 (2nd Cir. 1976), the court considered a prisoner's §1983 damages claim for solitary confinement suffered in 1967 as punishment for possessing writings which the defendant prison officials considered inflammatory. Applying the *Pierson* standard, the court upheld the claim insofar as the writings may have been religious in character, because previous decisions by that circuit in *Pierce v. LaValle*, 293 F.2d 233 (2nd Cir. 1961), and *Sostre v. McGinnis*, 334 F.2d 906 (2nd Cir. 1963), and by this Court in *Cooper v. Pate*, 378 U.S. 546 (1964), all of which upheld first amendment rights of prisoners to religious freedom, gave the prison warden "sufficient warning from the courts by 1967 that it was unconstitutional to impose punishment for . . . possession [of religious literature], "*Mukmuk*, 529 F.2d at 275. But *Mukmuk* ruled differently

insofar as the literature was political in character: "punishment for its mere possession may be unconstitutional under present standard. [citing *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971), and *United States ex rel. Larkins v. Oswald*, 510 F.2d 583 (2nd Cir. 1975)] . . . [but] it might be possible for [the warden] to establish that, under the law as it existed in 1967, his actions were in 'good faith reliance on a pre-existing procedure," *Mukmuk*, 529 F.2d at 275.

Applying the foregoing decisions to the within context, it becomes clear that by 1971 state prisoners located within the jurisdiction of the district court below possessed certain settled constitutional rights concerning their correspondence. These rights included due process protection against unreasonable regulation of their correspondence, procedural guarantees arising from the First Amendment, and the due process right of access to the courts. As further argued hereinbelow, the correspondence from plaintiff alleged by the within complaint to have been interfered with by defendants was protected from this interference by one or more of these established rights.

That due process protected prisoner correspondence against unreasonable regulation was clearly established for northern California by decisions which the district court below had rendered before 1971. Eschewing the "array of disparate approaches", *Procunier v. Martinez*, supra, 416 U.S. at 407, to constitutional standards for testing the regulation of communication involving prisoners, this district court instead adopted the due process standard of reasonableness for weighing such prisoner regulation against First Amendment guarantees. Thus in *Hyland v. Procunier*, 311 F. Supp. 749 (N.D. Calif. 1970), the court granted injunctive relief to a parolee from an order by his parole officer barring him from addressing a student ralley concerning conditions at Soledad Prison, the parole officer being fearful that the speech could spark student demonstrations which in turn might ignite disorder amidst the inmate population at said prison. Determining that imposition of this new condition upon

plaintiff's parole constituted a prior restraint directly upon his speech, invalid because the state could not show "a clear and present danger of riot and disorder," *Hyland*, 311 F. Supp. at 750, the court went on to rule:

> "But it is not only the apparent abridgment of the first amendment which concerns the Court. California as well as federal law has imposed the due process rule of reasonableness upon the State's discretion in granting or withholding "privileges" from prisoners, parolees, and probationers . . . [and] defendants herein have made no showing that the condition imposed on plaintiff's parole is in any way related to the valid ends of California's rehabilitation system," *Hyland*, 311 F. Supp. at 750.

In *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Calif. 1970), aff'd (sub nom *Younger v. Gilmore*) 404 U.S. 15 (1971), a three judge court echoed *Hyland* in testing the sufficiency of California prison law libraries in terms of a due process reasonableness standard applicable in varying degree to all constitutional rights for prisoners. The court summarized this viewpoint in stating that "prison officials are not now such masters of their own domain as to be free of the restraints of constitutional reasonability[44] [citing *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944), cert. den. 325 U.S. 887 (1945),

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[44] In here citing *Coffin v. Reichard*, supra, and *Jackson v. Godwin*, supra, the *Gilmore* decision confirms beyond doubt that the district court below intended the due process reasonableness test to apply to restrictions which curtail any prisoner right, including the right of free expression, to a degree less than enjoyed by free citizens. *Coffin* originated this "retained rights" approach with its oft-cited pronouncement that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law." *Coffin*, 143 F.2d at 445. In *Jackson*, involving the discriminatory denial to a black prisoner of black-oriented newspapers and magazines, the court declared, *Jackson*, 400 F.2d at 533, that "constitutional safeguards are intended to protect the rights of all citizens, including prisoners . . . particularly in the area of racial discrimination and deprivation of First Amendment freedoms."

and *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968)]", *Gilmore*, 319 F. Supp. at 108. The court further explained, *Gilmore*, 319 F. Supp. at 108-09, 109 n.6:

> "The courts have used various linguistic formulae to describe the limits to prison rulemaking authority . . . In most cases, however, the basic test remains the same: the asserted interest of the State in enforcing its rule is balanced against the claimed right of the prisoner and the degree to which it has been infringed by the challenged rule . . . prison rules must pass the basic test of due process reasonability, with that test being more or less stringent according to the character of the right taken from the prisoner."

Since First Amendment freedoms, including free speech, enjoy, "preferred" status, *Saia v. New York*, 334 U.S. 558, 561 (1947), *Jackson v. Godwin*, supra, the district court was unmistakably saying in *Gilmore* that prison regulations curtailing prisoner rights in the First Amendment area must meet an exacting test of reasonableness in order to pass muster.[45]

Between the *Gilmore* decision and the time period involved herein, the district court below rendered decisions further applying due process reasonableness to prison regulations restricting First Amendment rights. In *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Calif. 1970) the court vindicated in several respects the religious freedom of Muslim prisoners, one respect being to allow prisoner subscriptions to the Muslim newspaper upon determining that "past availability of [this]

[45]That the due process standard established by the district court below before 1971-72 demanded *stringent* reasonableness is not necessarily indispensible to plaintiff's contention that defendants violated his free expression rights while regulating his mail during 1971-72. Evidence aired thus far suggests that it could well be proven at trial that defendants obstructed plaintiff's mail for subjective and erratic reasons possessing no connection to any legitimate state interest, and hence deficient under *any* reasonableness standard (see pp. 67-68, infra).

subscription . . . has not resulted in disruption of prison discipline," *Northern*, 315 F. Supp. at 688. In *Payne v. Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Calif. 1971), decided on April 7, 1971, the court confirmed First Amendment rights of county main jail and medium security inmates to receive newspapers and magazines:

> "Whether couched in terms of the rights explicitly listed in the first ten amendments, or in terms of equal protection, or in terms of constitutional reasonability, these cases are united on one point: prison rules must bear a reasonable relationship to valid prison goals, and rules which infringe upon particularly important rights will require a proportionately stronger justification. [citing *Gilmore v. Lynch*, supra]"

Finally in *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Calif. 1972), decided on May 12, 1972, in midst of the period herein involved, the court considered constitutional challenges by pretrial detainees to various county jail conditions, including prisoner mail restrictions. Acknowledging that mail restrictions for convicted prisoners can be justifiably greater than for detainees, and may include the reading of incoming mail and some limitation on persons to whom outgoing mail can be sent, the court confirmed the exacting standard of reasonableness to which *all* prisoner correspondence is entitled, *Brenneman*, 343 F. Supp. at 142.

> "[B]etween the extremes of wholesale censorship and unbridled enjoyment of First Amendment rights, there are various alternative methods of regulating prisoner correspondence. The defendants must choose the least restrictive of those alternatives. See generally *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971)."

The foregoing decisions by the district court below were accompanied prior to 1971-72 by similar decisions from the

circuit court below,[46] the California state courts,[47] and lower federal courts in most other circuits.[48]

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[46]In *Smith v. Schneckloth*, 414 F.2d 680 (9th Cir. 1969), the circuit court below acknowledged that equal protection and due process guarantees follow inmates into prison to require of correctional authorities a standard of reasonable action. In *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, 480 F.2d 1062, 1065 (9th Cir. 1973), although decided after the pertinent time period, this circuit stated it to be "*axiomatic* that prison inmates . . . [do] not shed [their] first amendment rights at the prison portal," (italics supplied) relying for this proposition on its previous decision in *Smith* and on two supporting decisions rendered by other circuits during 1971–*Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971), and *Sostre v. McGinnis*, 442 F.2d 172 2nd Cir. 1971.

[47]In *Davis v. Superior Court*, 175 Cal. App. 2d 8, 20, 345 P.2d 513 (1959), the court acknowledged that prisoners possess, in necessarily curtailed form, the "freedoms of speech and communication", and on the basis of these residual rights placed a limit of reasonableness on exercises of the otherwise unqualified statutory power of prison wardens to censor and forbid prisoner communication. The state supreme court, in *In re Ferguson*, 55 Cal. 2d 663, 671, 12 Cal. Rptr. 753, 361 P.2d 417 (1961), declared itself "reluctant to apply federal constitutional doctrines to state prison rules reasonably necessary to the orderly conduct of the state institution," unless extreme mistreatment could be shown. However, in *In re Harrell*, 2 Cal. 3d 675, 87 Cal. Rptr. 504, 470 P.2d 640 (1970), the court, acknowledging generally that "constitutional rights of persons committed to prison must be accorded the same zealous protection that all constitutional rights enjoy," *Harrell* at 693, and in particular that "*Johnson v. Avery* heralds the advent of new principles governing the question of prisoner access to legal materials," *Harrell* at 695. The state supreme court formulated a stringent reasonableness test involving scrutiny of less restrictive alternatives in relation to such issues of prisoner access, *Harrell* at 686.

[48]The lower federal courts in other circuits had, by 1971, already dramatically eroded the "hands off" doctrine from the nearly complete hegemony which this judicial reluctance to consider prisoner rights possessed until the mid-1960's. In 1971, the "hands off" doctrine was entirely eclipsed in four circuits within which decisions then existed applying constitutional tests to protect prisoner rights of free expression. In the FIRST CIRCUIT, constitutional tests were

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The clear import of the foregoing line of decisions by the district court below that prisoner correspondence possessed

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formulated in *Palmigiano v. Travisono*, 317 F. Supp. 776 (D. Rh. Is. 1970) [upheld pretrial detainee correspondence], and *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971) [upheld inmate letters to press]. In the SECOND CIRCUIT, a "hands off" decision in *Thompson v. Fay*, 197 F. Supp. 855 (S.D. N.Y. 1961) [denied inmate contact with prison investigators] was supplanted by approval of constitutional tests in *Fortune Society v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970) [upheld prison reform magazine] *Corothers v. Follette* 314 F. Supp. 1014 (S.D.N.Y. 1970) [upheld inmates correspondence] and, *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971), cert. den. 404 U.S. 1049 (1972) [dicta on protecting content of inmate expression]. *Wilkinson v. Skinner*, 462 F.2d 670 (1972) [upheld all inmate mail content] predictably followed from *Sostre*. In the THIRD CIRCUIT, constitutional tests were approved in *United States ex rel. Gabor v. Myers*, 237 F. Supp. 852 (E.D. Pa. 1965) [upheld inmate personal mail], *Long v. Parker*, 390 F.2d 816 (3rd Cir. 1968) [upheld religious literature], and *Owens v. Brierly*, 452 F.2d 640 (3rd Cir. 1971) [upheld black oriented magazines]. In the FOURTH CIRCUIT, the "hands off" decision in *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964) [denied nonlegal correspondence], was supplemented by approval of constitutional tests in *McDonough v. Director of Patuxent*, 429 F.2d 1189 (4th Cir. 1970) [interests balanced in denying correspondence], *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971) [upheld religious literature], and *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971) [upheld official mail]. In the FIFTH CIRCUIT a comparatively early decision protecting prisoner expression, *Jackson v. Godwin*, 400 F.2d 529 (5 Cir. 1968) [black-oriented newspapers and magazines], often cited in other circuits in support of prisoner expression rights, egregiously did not forestall further "hands off" decisions in that circuit. Cf. *Brown v. Wainwright*, 419 F.2d 1308 (5th Cir. 1969) [denied general inmate mail], and *Theriault v. Blackwell*,, 437 F.2d 76 (5th Cir. 1970), cert. den. 402 U.S. 953 (1971) [denied letter to newspaper]. Each of the remaining circuits also possessed, by 1971, decisions embracing constitutional doctrine from which decisions actually protecting prisoner expression could reasonably be foreseen to follow. Within these circuits, such doctrinal decisions generally marked the substantial muting or termination of the "hands off" doctrine, and were invariably followed within several years by decisions from the same circuits actually upholding prisoner

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constitutional protection was further emphasized by existing decisions of this Court. In *Cooper v. Pate*, 378 U.S. 546 (1964), the First Amendment was affirmed to extend within prison walls insofar as religious freedom is concerned. Also see: *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curium*, 390 U.S. 333 (1967) [prisoners do not lose all constitutional rights, and are protected by due process and equal protection]. That *Cooper* suggested if not portended the application of First Amendment rights to protect prisoner correspondence is driven home by established constitutional

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expression. Thus in the SIXTH CIRCUIT, the decisions in *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971) and 330 F. Supp. 707 (N.D. Ohio) [inmate correspondence denied through constitutional balancing] preceded *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Kan. 1973) [upheld inmate expression]. In the SEVENTH CIRCUIT, the "hands off" decision in *Goodchild v. Schmidt*, 279 F. Supp. 149 (D. Wis. 1968) [denied medical letter], gave way to a religious expression test in *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967) [upheld religious literature] which served as a harbinger for *Adams v. Carlson*, 352 F. Supp. 882 (E.D. Illin. 1973) [upheld all inmate expression], and *Morales v. Schmidt*, 489 F.2d 1335 (7th Cir. 1973) [upheld all inmate expression]. In the EIGHTH CIRCUIT, the "hands off" decision in *Lee v. Tahash*, 351 F.2d 970 (8th Cir. 1965) [denied nonlegal mail], was departed from in *Peek v. Ciccone*, 288 F Supp. 329 (W.D. No. 1968) [upheld religious letter], which led directly to *Tyler v. Ciccone*, 299 F. Supp. 684 (W.D. Mo. 1969) [upheld inmate expression], and *Remmer v. Brewer*, 475 F.2d 52 (8th Cir. 1973) [protecting all inmate expression]. In the TENTH CIRCUIT, the "hands off" decision in *Pope v. Daggett*, 350 F.2d 297 (10th Cir. 1965) *vacated as moot*, 384 U.S. 33 (1966) [denied letter to probation officer], gave way to *LeVier v. Woodson*, 443 F.2d 361 (10th Cir. 1971) [upheld legal and official mail], which was supplanted in turn by *Battle v. Anderson*, 376 F. Supp. 402 (C.D. Okla. 1974) [protecting all expression]. In the DISTRICT OF COLUMBIA CIRCUIT, *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969) [upheld religious freedom] pronounced broad First Amendment doctrine that led directly to affirmation of prisoner free speech rights in *Washington Post v. Kleindienst*, 357 F. Supp. 770 (D.D.C. 1972), *modified*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd on other grnds* (sub nom *Saxbe v. Washington Post Co.*) 417 U.S. 843 (1974).

interpretations of free expression and religious freedom as closely interrelated guarantees, *Saia v. New York*, supra [both guarantees stand together as preferred freedoms], *Cantwell v. Connecticut*, 310 U.S. 296 (1939) [both guarantees invoked by facts therein], and of expression through the medium of mail as falling squarely within the ambit of First Amendment protection, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), *Blount v. Rizzi*, 400 U.S. 410 (1971).

Existing decisions by this Court also made clear that prisoners were entitled in 1971 to some measure of procedural protection for their mail against unwarranted infringement, at least in jurisdictions where as herein prisoner mail was clearly recognized to be infused by fundamental constitutional guarantees. As to rule-making impositions upon speech, it was long established that the First Amendment furnished procedural protection against "licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to [legitimate purposes]", *Kunz v. New York*, 340 U.S. 290, 294 (1950). As to adjudicatory impositions upon speech, it was established that the finely drawn "line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished . . . calls for . . . sensitive tools," *Speiser v. Randall*, 357 U.S. 513, 526 (1958). It was in application of the latter precept that this Court, in *Freedman v. Maryland*, supra, prescribed prompt judicial review of administrative decisions to censor movies deemed obscene. This procedural safeguard for review of administrative censoring decisions was applied, in *Blount v. Rizzi*, supra, to facts closely analogous to the within context, the Court there requiring prompt judicial review of obscene mail censorship by postal officials

Another form of constitutional protection, indisputably established before 1971, which reached a sizeable share of prisoner mail consisted in the right of access to the courts. Assured by due process, this right was first recognized in *Ex Parte Hull*, 312 U.S. 546 (1940) and well established in

decisions of the federal and state courts in California, *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir. 1961), *Dewitt v. Pail*, 366 F.2d 682 (9th Cir. 1966), *Gilmore v. Lynch*, supra, *In re Allison*, 66 Cal.2d 682, 67 Cal. Rptr. 593, 425 P.2d 193 (1967), *In re Harrell*, supra. Formerly protected by only limited judicial scrutiny which was deemed satisfied so long as a reasonable degree of court access was allowed, even if "access could have been further facilitated without impairing effective prison administration," *Hatfield*, supra, 290 F.2d at 640, the prisoner right of access was clearly recognized by 1970 as "a constitutional imperative which has been held to prevail against a variety of state interests," *Gilmore*, 319 F. Supp. at 109, and to possess the enhanced protection of a stringent reasonableness test in which the balancing of interests includes inquiry into less restrictive state alternatives, *In re Harrell*, supra.

This right of access clearly encompassed "all the means a defendant or petitioner might required to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him," *Gilmore*, 319 F. Supp. at 109, and accordingly had been applied to permit a prisoner to contact his attorney by telegram rather than ordinary letter, *Allison*, and to send letters for such purposes as seeking to retain legal organizations, *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970) [ACLU], *Coleman v. Peyton*, 340 F.2d 603 (4th Cir. 1965) [NAACP], securing needed expert witnesses, *McDonough v. Director of Patuxent*, supra [psychiatrist], *Glenn v. Wilkinson*, 309 F. Supp. 411 (W.D. Miss. 1970) [medical expert], and raising funds to defray needed legal expenses, *McDonough v. Director of Patuxent*, supra, [magazine sponsored fund-raising sought].

The foregoing review of decisional law prior to 1971 removes any possibility that defendants herein could reasonably have believed valid any instances of interference with plaintiff's outgoing mail which are ultimately found to

conflict with the constitutional standards established by these decisions.[49]

[49]The preliminary evidence presented for summary judgment suggests that the interference with plaintiff's mail may well have conflicted with the foregoing constitutional standards in these respects:

(1) *First Amendment and due process protection:* the state regulations appear to delegate nearly unlimited discretion to prison wardens to make mail decisions in any manner they wish (see footnote 8, supra). The criteria set forth in D2402(8) of these regulations, particularly the prohibitions therein of mail deemed "defamatory" or "otherwise inappropriate" appear likely to have further fostered loosely made mail decisions. Indeed, the Soledad associate warden admitted to plaintiff that officials at his prison took a loose, subjective approach in confiscating prisoner mail (R 77-78), and the rejection of plaintiff's news media letters because not legal, business, or personal (see footnote 9, supra) certainly seems to confirm the free play of subjective whim in mail decisions at Soledad. Also see: *Procunier v. Martinez, supra,* 416 U.S. at 415-416. To the extent it is ultimately proved herein that plaintiff's obstructed correspondence fell victim to such ill-considered decision-making, the due process requirement that mail obstruction be reasonably justified by legitimate state objectives would doubtless have been contravened, as would the procedural protection of plaintiff's First Amendment interests against undue delegation of regulatory power.

The further First Amendment and due process assurance of procedural recourse from mail refusals believed constitutionally unjustified certainly called by 1971 for at least limited opportunity to seek administrative review of such determinations. Cut to the most minimal, such opportunity for review includes return of the refused mail to the inmate or other notification to him of the refusal, together with at least the ad hoc availability of some administrative superior to review mail refusals at inmate request. It presently stands undisputed herein that, apart from return of his news media letters and the communicated refusal to register his letter to the Prison Law Project, plaintiff was never even notified in any manner of decisions to interfere with his mail.

(2) *Right of access protection:* it may well be found that interference with certain of plaintiff's mail effectively barred him from obtaining judicial relief. As to his federal habeas corpus effort, it could ultimately be found that plaintiff was denied judicial relief therein because repeated mail interference barred him at every turn from obtaining the help needed to articulate his claims with full effect (see

(continued)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be confirmed.

Respectfully submitted,

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(footnote continued from preceding page)
pp. 2-5, supra). As to the within civil rights action, it may well be found that obstruction of plaintiff's letters to law projects during early 1972 seeking their representation in the within matter effectively denied to plaintiff the injunctive relief from further mail interference that comprised his pivotal objective in undertaking this action.

FOR ARGUMENT.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, et al., *Petitioners,*

vs.

APOLINAR NAVARETTE, JR., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CLOSING BRIEF FOR PETITIONERS

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OF THE
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OCTOBER TERM, 1976

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CLOSING BRIEF FOR PETITIONERS

ARGUMENT

NEGLIGENCE IS NOT A PROPER BASIS FOR RELIEF UNDER SECTION 1983

Respondent Navarette's complaint alleged that while he was imprisoned in 1971 and 1972, 13 items[1] of correspondence he delivered to petitioners (state

[1]In his brief (RB 2 n. 1), respondent Navarette states there were 25, not 13 letters. The complaint lists 13 items of correspondence which were not received, several of which were allegedly directed to multiple addressees (App. 6-8). It is these 13 items of mail to which we refer in our brief (Pet. Br. 3).

Respondent correctly points out (RB 5 n.6) that his counsel first appeared in this case in February 1973 (R 22), not February 1972 as was mistakenly noted in our opening brief (Pet. Br. 4 n.4). The inaccuracy was inadvertent and is regretted.

prison officials) for mailing were not received by his addressees.

The sole issue before this Court is whether respondent's third cause of action that state prison officials' negligence was the proximate cause of the non-receipt of the 13 items of mail by the addressees (App. 12-13), states a claim for damages under Title 42, United States Code, section 1983, for infringing his right of free expression.

Respondent Navarette now attempts to assert that he retains a cause of action for denial of access to the courts in the non-delivery of his mail (RB 3 n.2). As pointed out in our opening brief (PB 3 n.2), respondent's initial complaint alleged that interference with his mail also resulted in a denial of access to the courts, but that claim was dismissed (R 20, 171, 192). No appeal was taken and denial of access to the courts was not reasserted in the subsequent complaints (R 34, 95). The Court of Appeals expressed no opinion whether the allegation of mail interference stated a claim for denial of access to court or counsel (App. Pet. iii, n.1). This is not surprising since in respondent's brief in the district court he stated unequivocally: "The claim against mail interference does not purport to allege denial of access to the courts." (R 171:18). The disclaimer was repeated in his reply brief in the Court of Appeals (Reply Br. 7, 9): "The complaint does not purport to allege denial of access to any court."

Respondent Navarette also sees a footnote in *Monroe v. Pape,* 365 U.S. 167, 174 n.10 (1961), partially

quoting the remarks of Congressman Arthur of Kentucky as support for his negligence theory. (RB 13). The full passage reads as follows:

> ". . . But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable . . ." (Cong. Globe, 42nd Cong., 1st Sess. 365 (1871))

In fact, there is little solace for respondent in this comment. First, Congressman Arthur was an opponent of the Ku Klux bill and was exaggerating its scope in an effort to scuttle it. Second, contrary to Mr. Arthur's politically motivated prognostications this Court has held judges and legislators absolutely immune from damages and governors and sheriffs immune from damages when their intentional conduct is in good faith. Third, mere errors in judgment have never been held actionable under section 1983, either by this Court or any lower federal court. Strict liability has not been reached under section 1983. No court has yet so held nor is it a certified question in our case.

By way of contrast, a supporter of the bill, Congressman Ellis H. Roberts, in discussing the factors which showed the necessity for the Ku Klux Act stated:

> "These, then, are no common crimes. They are not a sporadic, accidental, scattering; . . . They

are *deliberate, systematic,* instigated from a common source, seeking a common end." (Emphasis added). Cong. Globe, 42nd Cong., 1st Sess. 412-413.

Thus, it was the intentional, not the negligent depredations of the Klan and their accomplices in state and local government which was the evil the Act sought to correct. We submit that the legislative history of section 1983 confines its coverage to intentional conduct and its nonfeasance analogue, deliberate indifference.

In his brief, respondent Navarette also exhaustively summarizes a string of lower federal court decisions which assertedly support his view that negligence states a cause of action (RB 27-43.)[2] These lower court decisions are inapposite. With one exception,[3] all typically required more than simple negligence to find a federal claim stated. Moreover, the cases cited precede the more recent trend in the federal courts rejecting negligence as a basis for section 1983 liability and limiting the statute to intentional conduct, including deliberate indifference.[4]

---

[2]Amicus engages in a similar exercise (A.C. Br. 20-22). As to the decision primarily relied upon (*Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971), amicus fails to point out that it was later modified to delete negligence as a basis of liability under section 1983: "We modify our opinion so as to declare that the liability of the defendant, Arterbury, rests upon Mississippi law applied under the doctrine of pendent jurisdiction." 456 F.2d 835.

[3]*McCray v. Maryland*, 456 F.2d 1, 5-6 (4th Cir. 1972), but see *Bowring v. Goodwin*, 551 F.2d 44, 48 (4th Cir. 1977), discussed below, note 4.

[4]In addition to the cases cited in our opening brief (Pet. Br. 18 n.26), the following recent decisions confine section 1983 to intentional conduct and reject negligence as a basis for a cause of action. *Smart v. Villar*, 547 F.2d 112 (10th Cir. 1976); *McDonald v. State of Illinois*, 557 F.2d 596, 601 (7th Cir. 1977); *Little v. Walker*, 552 F.2d 193, 198 n.8 (7th Cir. 1977); *Bass v. Sullivan*, 550 F.2d 229 (5th Cir. 1977); *Bowring v. Goodwin*, 551 F.2d 44, 48 (4th Cir. 1977); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1080-1081 (3rd Cir. 1976).

It is noteworthy that in *Hampton*, the Third Circuit has retreated from its earlier view that "culpable negligence" stated a 1983 claim (*Howell v. Cataldi*, 464 F.2d 272, 279 (3rd Cir. 1972). *See Jones v. McElroy*, 429 F.Supp. 848, 861-863 (E.D. Pa. 1977). Similarly, in *Bowring*, the Fourth Circuit limits section 1983 liability to deliberate indifference, not negligence, and does not discuss its earlier cases (*McCray v. Maryland, supra; Jenkins v. Averett*, 424 F.2d 1228 (1970)), holding that negligence or gross negligence states a cause of action.

We believe, however, that the essence of Navarette's position is that *Monroe v. Pape* [365 U.S. 167] sanctions a 1983 cause of action in negligence (RB 13-15). This was also the view of the Court of Appeals (App. Pet. vi-viii). For the reasons stated in our opening brief (Pet. Br. 8-9, 11-12), *Monroe* is clearly distinguishable. But if this Court agrees with those who suggest that much of *Monroe* has already been overruled *sub silentio* in *Estelle v. Gamble* [429 U.S. 97] and *Paul v. Davis* [424 U.S. 693], then it would not be inappropriate to do so unequivocally.

Amicus argues that this Court should construe respondent Navarette's complaint as one alleging deliberate indifference and remand the case for trial (A.C. 4). Amicus betrays his unfamiliarity with the case. The complaint in the first and second causes of action already alleges deliberate refusal to send the mail. There is no need for the Court to create such a claim by construction. The question is whether respondent will also have an alternative theory of negligence to fall back on before a jury if he cannot show refusals amounting to deliberate indifference.

Amicus also argues that the qualified immunity [created by this Court] for good faith acts of public officials is incompatible with the objective concept of negligence. (A.C. 16, 17). We agree. (Pet. Br. p. 12). But then he asserts that therefore this Court's cases delineating that qualified immunity are inapposite. In this he is mistaken. We again submit that "the subsequent recognition of a qualified immunity . . . based on good faith demonstrates that intentional conduct was the focus of section 1983 . . ." Pet. Br. p. 12. Our point was that this Court has thus far confined section 1983 to intentional acts.[5] We cannot instruct amicus further.

Amicus then argues that *Wood v. Strickland,* 420 U.S. 308 (1975) imports a "reasonable man standard" or an objective element into the concept of good faith. A.C. Br. page 10. We agree. Pet. Br. page 19. But amicus further asserts this means that this Court has sanctioned negligence actions under section 1983. We think not. The *Strickland* concept was expressly confined to intentional acts resulting in a deprivation of "basic unquestioned constitutional rights." 420 U.S. at 322.[6]

[5] *Wood v. Strickland* involved intentional conduct, not negligence. 420 U.S. at 310. The same is true of *Pierson v. Ray* [386 U.S. 547]; *Scheuer v. Rhodes* [416 U.S. 232] and *O'Connor v. Donaldson* [422 U.S. 563].

[6] A number of courts and commentators seem to agree with the position taken in our opening brief that "no constitutional right is 'clearly established' until first articulated by this Court and then a reasonable period of time for dissemination of this Court's ruling is permitted" (Pet. Br. 20). *See,* Note, *The Supreme Court, 1974 Term,* 89 Harv.L.Rev. 1, 224 n.38-39, 225 n.40-41 (1975), and cases there collected. Whether a right is "clearly established" is properly a question of law to be decided by the court. *Id.,* at pp. 222 n.29, 223. See also *Sapp v. Renfroe,* 511 F.2d 172, 178 (5th Cir. 1975).

The position of amicus confuses two discrete concepts: the application of the reasonableness standard to limit the extent of subjective good faith immunity where the result was intended and the use of the same standard to determine liability where the factual result was not intended.

"Negligence is conduct and not a state of mind." W. Prosser, *Law of Torts,* page 145. A reasonable man test is applied in negligence law to assess the quality of the actor's conduct when it produces an unintended factual result: injury to another. If the conduct was unreasonable in light of the risk of harm, the actor is deemed negligent.

Qualified immunity on the other hand, is concerned with the actor's state of mind: his good faith. The objective reasonableness element of the immunity standard has only limited application. The question to which it is applied is not whether the actor's conduct is reasonable in light of the unintended factual harm produced; but whether the actor's asserted lack of knowledge of the legal (constitutional) consequences of his conduct is intolerable and therefore unreasonable when the precise factual result he intended has occurred.

Given a frame of mind amounting to subjective good faith, under *Wood v. Strickland,* only when intentional conduct results in the deprivation of "settled, indisputable" constitutional rights does the re-

quired objective component override subjective innocence and impose liability under section 1983. 420 U.S. at 322. Thus, the degree of ignorance condemned in *Strickland* is comparable to and compatible with the quantum of inaction condemned as deliberate indifference in *Estelle v. Gamble*. In both cases the actor intends the factual result or at least acts in such disregard of the factual consequence as to constitute a deliberate indifference to that result and its constitutional consequences.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Dated, San Francisco, California,
September 27, 1977.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, *et al.*,
Petitioners,

—v.—

APOLINAR NAVARETTE, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus [1/]

The American Civil Liberties Union is

1/ Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

a nationwide, nonpartisan organization of over 250,000 members. It is organized solely for the purpose of protecting the civil rights and liberties of Americans. The American Civil Liberties Union has been in existence since 1920. One of the constant concerns of the organization has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. Amicus is most concerned about the importance of protecting citizens civil rights and liberties by imposing sanctions against those state officials who abuse their office or are indifferent to the rights of those they are alleged to serve. We have been concerned that recent decisions of the Court have hampered the historic role of the United States District Courts in implementing remedies for such violations of civil rights. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Paul v. Davis, 424 U.S. 693 (1976); Hicks v. Miranda, 422 U.S. 332 (1975). One of our concerns is that this case, in which the Court of Appeals followed settled law in concluding that the plaintiffs, alleging that prison officials negligently failed to carry out their clearly established constitutional duties, presented a claim sufficient to withstand summary judgment, not become a vehicle for the overruling or narrowing of Monroe v. Pape, 365 U.S. 167 (1961).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 536 F.2d 277.

QUESTION PRESENTED

Can negligent actions by prison officials ever serve as the basis for a suit under 42 U.S.C. §1983?

STATEMENT OF THE CASE

The only issue before this Court is whether the plaintiff's third cause of action in his amended complaint was properly upheld by the Court of Appeals. That claim charged that three subordinate Soledad Prison correctional officials "negligently and inadvertently misapplied the prison mail regulations" in effect at the time and as a result certain of plaintiff's letters to certain newspapers failed to reach their destination. The third cause of action also includes a claim against three supervisory prison officials for their "negligent failure to furnish" the subordinate officials with sufficient training regarding evaluation of prisoner mail, in other words, for negligently failing to train and supervise the subordinate officials. The Court of Appeals held that this cause of action stated a valid claim and that the affi-

davits submitted on behalf of the defendants were insufficient to justify summary judgment.

Introduction and Summary of Argument

This case could be disposed of by the Court quite simply. It is well-established that an action may be dismissed at the pleading stage only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Since the complaint alleges that the subordinate prison officials negligently and inadvertently failed to mail certain letters and that their superiors negligently failed to train and supervise them, the plaintiff should be allowed to prove his claim. The petitioners admit that "deliberate indifference" could be the basis of a Section 1983 action (Petitioners Brief, at 9), as could an "unwillingness to act in the face of a known duty to do so." (Ibid. at 6). This Court should easily construe plaintiff's complaint as fitting within that standard and remand the case for trial, in accordance with the Ninth Circuit's decision below. But the State of California has instead asked this Court to take a giant step backward in interpreting Section 1983. There is no need to do so under any circumstances and, for the following reasons, there is certainly no basis for doing so here.

Petitioners misconstrue Section 1983 in claiming that negligence cannot be the basis for a civil rights suit. Previous §1983 cases have dealt with problems of defining "person," "state" or the constitutional right involved. But these cases do not relate to whether the conduct complained of must be volitional or negligent.

In fact, the development of the good faith defense in §1983 cases undercuts petitioners' position. The theory of the good faith defense is that a state official should not be held answerable in damages if he reasonably believed in the legality of his acts. The touchstone of the defense is what a reasonable state official would believe he could do in the circumstances. Negligence theory applies the same approach: what risks to a constitutional right would a reasonable state official foresee with respect to his actions. A reasonable man test is used in both areas for the same reason: Section 1983 demands of state officials that they be concerned about unreasonable risks to constitutional rights and unreasonable assumptions about the legality of their conduct.

Negligence does not involve any good or bad faith by a state official. It involves the unreasonable assumption of risk. If the risk is to a constitutionally protected right, then Section 1983 should apply. Viewed from another per-

spective, if the negligence involves an unreasonable risk to the constitutional rights of a wide number of citizens, the basic promise of Section 1983 would be violated by refusing to recognize a cause of action.

Lower federal courts have consistently upheld Section 1983 cases based upon the negligence of state officials, particularly when the negligence relates to their training and supervision of personnel under their command. That is precisely what is involved in the instant case.

ARGUMENT

A Claim of Negligence Can Validly Serve as a Proper Basis for Relief Under Section 1983.

The simplicity of the question presented in this case masks the revolutionary step which the State of California is asking this Court to take. By confusing a series of separate elements in the §1983 cause of action, the California prison officials are asking this Court virtually to wipe out one phase of §1983 jurisprudence, to eliminate an important protection for citizens' rights and to overrule a long line of precedents upholding claims such as those involved in the instant case. There is no justification for gutting Section 1983 in this manner.

A. The Petitioners Misconstrue the Scope of the Section 1983 Cause of Action.

Petitioners basic misconception is to treat Section 1983 cases as if they had but a single component. They argue that such cases are confined to intentional conduct by state officials. In support of this notion they treat a series of this Court's decisions in §1983 actions as if they involved a continuous development of a single theme leading to the conclusion the petitioners urge. But a closer look at the cases cited by petitioners demonstrates that the cases involved entirely

different components of a 1983 action than that involved in this action.

To succeed in a Section 1983 action, a citizen must show that he was deprived of a right, privilege or immunity secured by the Constitution or federal law through the actions of a person acting under color of law of a state. These elements have been before the Court a number of times.

Thus this Court held that the term "person" does not include a municipality, Moor v. County of Alameda, 411 U.S. 693 (1973), and the term "state" does not include the District of Columbia, District of Columbia v. Carter, 409 U.S. 418 (1973).

This Court has also held that rules on standing, injury, and case and controversy apply as well to Section 1983 actions. See Warth v. Seldin, 422 U.S. 490 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974); Rizzo v. Goode, 423 U.S. 362 (1976).

Finally, this Court has established special rules on immunity in suits for damages against state officers sued under Section 1983. In Pierson v. Ray, 386 U.S. 547 (1967), this Court held that a police officer does not have to anticipate constitutional changes and cannot be held liable in damages for an arrest under a law later held unconstitutional. In Scheuer v. Rhodes, 416 U.S. 232 (1974), Wood v. Strickland, 420 U.S. 308 (1975), and O'Connor v. Donaldson, 422 U.S. 563

(1975), this Court established the test of qualified, good faith immunity for state officers sued for damages.

These cases are treated by the petitioners as if they all dealt with the problem now before this Court. But none of them has anything to do with the issue of whether the conduct of the state official must be volitional or negligent. In fact, the implications of those cases are contrary to the petitioners' position.

This Court established a good faith defense in Wood v. Strickland, with both a subjective and an objective "reasonable man" component. A state official cannot be held liable for intentional acts if he sincerely believed in the legality of his acts and if that belief was reasonable. That approach can be applied precisely to negligent acts as well.

Prosser has written: "In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them." Prosser, Handbook of the Law of Torts, (4th ed. 1971) (hereafter "Prosser on Torts"), at 145. If a state official foresees that a constitutionally protected right of a citizen is endangered by his acts or omissions, he will be liable

under traditional Section 1983 principles. However, if he does not foresee such a danger, but a reasonable man in his position would have done so, he should also be liable.

The good faith defense set out in Wood v. Strickland already utilizes the reasonable man approach which is at the heart of negligence theory. If a police officer arrests a person under a vagrancy law already held unconstitutional, he may sincerely believe he has the right to do so. But a federal court could well conclude that the officer "reasonably should have known that the action he took... would violate the constitutional rights of the [person] affected..." Wood v. Strickland, 420 U.S. at 322. Thus he would be held liable.

The negligence theory is simply an application of the good faith defense at an earlier stage, to the conduct itself, instead of at the stage of a fact-finder viewing its presumptive legality. If a state officer reasonably should have known that his actions or omissions would have caused an injury to a constitutionally protected right of a citizen, then he should be held liable.

In standard negligence theory, a plaintiff can succeed if he shows: (1) a duty recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure on his part to

conform to the standard required; (3) a reasonably close causal connection between the conduct and the resulting injury; (4) actual loss or damage. Prosser on Torts, at 143.

Section 1983 requires an injury to a constitutionally protected right. Thus this approach will not increase suits against state officers since lower courts have long recognized negligence as the basis for a Section 1983 action. 2/

2/ Petitioners claim that recognizing negligence as the basis for a Section 1983 action will significantly increase the number of civil rights suits brought to the overcrowded federal courts. That claim is wrong. As noted in the text, federal courts have long recognized negligence as the basis for such suits. In addition, the increase in civil rights suits since 1960 is due in part to passage of laws against employment discrimination, discrimination in public accomodations, infringement of voting rights and so on. The rubric of "civil rights" suits used by the Administrative Office of the United States Courts is not equivalent to Section 1983 actions. See Friedman, The Good Faith Defense in Constitutional Litigation, 5 Hofstra L. Rev. 501, n. 1 (1977).

Similarly, this Court has limited the applicability of 18 U.S.C. Sections 241 and 242 to criminal acts which specifically interfere with interests protected by a clearly delineated constitutional right. See Anderson v. United States, 417 U.S. 211 (1974); United States v. Ehrlichman, 546 F.2d 910, 921 (D.C. Cir. 1976). In the same way, requiring that the foreseeability of injury be limited to constitutionally protected rights will limit the number of negligence cases against state officials.

In short, basic principles of tort liability can be and should be applied to the situation before this Court. Just as a person cannot be allowed to disregard well-established constitutional rights, he cannot be permitted to overlook the dangers to those rights which a reasonable man would foresee.

In addition, the broad proposition urged by the petitioners would apparently apply to suits for injunctive relief as well as for damages. But the development of the good faith defense has been carefully limited to the issue of damages. Whether or not the Mississippi policeman in Pierson, the Ohio National Guard officials in Scheuer, the Arkansas school administrators in Wood and the Florida hospital officials in O'Connor were ultimately liable for damages, if their conduct was held to be unconstitutional, it can and must be enjoined and declared invalid. If

a federal court finds a constitutional violation, it must grant such relief so long as Congress has given the court power and jurisdiction to do so - as it has done in a Section 1983 case. As the District of Columbia Circuit explained in National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974):

> A good faith defense in a suit for damages brought against any federal official as an individual is seemingly established by Bivens v. Six Unknown Agents, 456 F.2d 1339 (2d Cir. 1972) on remand from the Supreme Court, 403 U.S. 388 (1971), but that defense is not assertable in the face of a quest limited to injunctive, declaratory or mandamus relief. 3/

In the same way, any negligent interference with a person's constitutional rights must be declared invalid and enjoined. If prison officials negligently interfere with the First Amendment rights

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3/ Although the NTEU case involved a suit against a federal official, federal courts have applied the same standards of immunity for both federal officials sued in a Bivens-type action and state officials sued in a Section 1983 action. See Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975).

of prisoners, see Procunier v. Martinez, 416 U.S. 396 (1974), their Fifth and Sixth Amendments rights, see Wolff v. McDonnell, 418 U.S. 539 (1974), or their Eighth Amendment rights, see Estelle v. Gamble, ___ U.S. ___, 50 L.Ed. 2d 251 (1976), federal courts must stop those actions regardless of whether they were negligent or intentional.

The problem of personal liability for damages for negligent acts involves precisely the same considerations as those involved in the good faith defense outlined by this Court in Wood v. Strickland, supra - a balancing between the need for vigorous administration of the laws and the need to protect citizens' rights. As noted below, the line between volitional or intentional acts and negligent acts is often difficult to draw - which is precisely why plaintiff in this case alleged in one cause of action that there was an intentional failure to mail his letters and in another cause of action that there was a negligent failure by the defendants.

The basic theory of the Section 1983 cause of action is that state officers clothed with the enormous power of their office have the potential of doing great damage to the citizens whom they serve. If they misuse that power deliberately to cause injury to rights protected by the Constitution, they must answer in damages. Similarly, if their actions, though inadvertent or negligent, have the potential

to do injury to the constitutionally-protected interests of many citizens whom they are serving, Section 1983 should provide relief. There is no interest to be served by encouraging state officers to be careless or inadvertent or indifferent with respect to the rights of the citizens they serve. "Any lesser standard would deny much of the promise of §1983." Wood v. Strickland, 420 U.S. at 322.

B. Petitioners Misconstrue the Nature of Negligence in a Section 1983 Cause of Action.

There are at least three separate definitions of the term "negligence" which the California state petitioners confuse in their brief. (1) Negligence may mean carelessness generally, a lack of ordinary care; (2) negligence may often be used to signify a particular state of mind with which an act is done - "a mental element, usually one of inadvertence or indifference," Prosser on Torts at 139. (3) Negligence may also mean conduct itself, an instance of carelessness or inattention or omission to act when the opposite would be expected of a reasonable person.

The legal definition tracks the third meaning noted above. In Prosser's definition of the term:

> Negligence is a matter of risk - that is to say, of recognizable danger of injury. It has

> been defined as "conduct which involves an unreasonably great risk of causing damage" or... conduct "which falls below the standard established by law for the protection of others against unreasonably great risk of harm." "Negligence is conduct, and not a state of mind." Ibid. at 145.

Thus the petitioners are totally in error when they cite this Court's decisions in the cases dealing with the good faith defense as supporting their position. It is true that negligent conduct does not involve "bad faith" or "malice." But that is irrelevant. In the first place, Section 1983 cases do not require an allegation or showing of bad faith or malice, as this Court made clear in Wood v. Strickland. Secondly, good or bad faith are totally irrelevant when dealing with negligent actions. Judge Swygert of the Seventh Circuit recently pointed out, in a dissent in Bonner v. Coughlin, 545 F.2d 565, 573 (7th Cir. 1976)(dissent), that there can be no good faith in a negligence action:

> This argument collapses upon examination. Its underlying premise is that good faith is nothing but the absence of bad faith, and since an official can only act in bad faith when he is acting intentionally, a nonintentional act can never be in bad faith. While it may be true that a nonintentional act cannot be

> in bad faith, it is not true that good faith is simply the absence of bad faith. Good faith requires that "[t]he official himself [is] acting sincerely and with a belief that he is doing right." Wood, 420 U.S. at 321. Such an affirmative belief is only possible with respect to intentional acts. It is nonsensical to speak of committing a negligent act in good faith.

There are some acts of prison officials that do not serve as the basis for a §1983 action, - when a constitutional right is not involved. For example, in Bonner v. Coughlin, supra, the Seventh Circuit en banc held that prison guards cannot be held liable under §1983 for "negligently" leaving the plaintiff's cell door open after a security search, which conduct resulted in the loss of his trial transcript. Plaintiff claimed that his property was taken without due process of law and thus that he had the basis for a Section 1983 suit. The Seventh Circuit rejected his claim. The court cited this Court's recent decision in Paul v. Davis, 424 U.S. 693 (1976), and found that the plaintiff "has pointed to no specific constitutional guarantee against the negligence of the two prison guards," 545 F.2d at 567. But Paul v. Davis dealt with the nature of the constitutional right and not the state of mind with which an act was done or the doing of the act itself. Thus the Bonner decision merely means that there

was no due process right to begin with in the circumstances of the case. 4/

If a prison guard, knowing that his car has bad brakes, negligently runs over a prisoner in an exercise yard, there may be no Section 1983 action. This is true because no constitutional right is infringed even if state law would permit such a suit. But if he intentionally or inadvertently or negligently failed to allow a prisoner to go to religious services in prison, then different considerations apply, as explained below.

Similarly, this Court in Estelle v. Gamble, supra, focused on the nature of the constitutional right involved. This Court held that the "infliction of...unnecessary suffering" upon prisoners by denial of medical care is a violation of the Eighth Amendment. 50 L.Ed.2d at 259. The reach of the Eighth Amendment right includes protection against the infliction of such

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4/ The Seventh Circuit in its opinion seemed to confuse the nature of the constitutional right involved and the injury which plaintiff had suffered since a copy of the transcript was later returned. The Court also questioned whether there was any state action because the loss of the transcript occurred after the state action had ended. However, at the heart of the opinion was the parallel with Paul v. Davis, which is discussed above.

pain through the "deliberate indifference to a prisoner's serious illness or injury." Ibid. at 260. This Court noted,

> a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. Ibid. at 261.

In short, the Eighth Amendment right itself is defined to protect against deliberate indifference to a prisoner's medical needs. The right itself does not include protection against negligent treatment or diagnosis.

Another approach to this problem was suggested in Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976). In that case, the Fifth Circuit en banc had to consider the liability of a sheriff for negligently failing to release a prisoner after the District Attorney had dismissed all charges against him. He stayed in jail for 35 days after after the dismissal. He then sued under §1983 for false imprisonment. The Fifth

Circuit held that the sheriff was entitled to an instruction on the good faith defense even if Texas law did not recognize it. Further it held that while his negligence in one case might not be enough to incur liability, "[i]f he negligently establishes a record keeping system in which errors of this kind are likely, he will be held liable." 530 F.2d at 1215.

Where negligence of state officials has the potential for inflicting widespread harm to the individuals they are serving, such acts must be the basis for a §1983 action. 5/ Where the negligence relates to a system of training and supervision, the likelihood is great that the acts in question will have continuing impact and will injure other citizens. In those situations, such as that involved here, the purpose of Section 1983 requires a recognition of the cause of action.

C. Lower Federal Courts Have Consistently Recognized the Validity of Claims Similar to That Involved in This Action.

Petitioners have misapprehended the nature of negligent violations of civil rights. By focusing their attention on examples of personal injury actions (e.g.,

5/ See Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501, 520-522 (1977).

Kent v. Prosse, 265 F.Supp. 673 (W.D. Penn. 1967), Petitioners Brief at 18, (where a prisoner was injured by a piece of faulty machinery), they would have the Court believe that such matters are representative of the character of negligent violations of civil rights recognized by the federal courts. This could not be further from the truth. Nor is it comparable to the situation presented in this case. The conduct on which plaintiff bases his complaint is that of a negligent failure by an official to perform his duty. This negligent conduct directly resulted in the violation of plaintiff's "clearly established" constitutional rights. Examined in this light, the decision of the Court of Appeals is exactly in line with the trend of recent lower court holdings on this issue.

In a 1972 case similar to the cause of action asserted by plaintiff, the Fifth Circuit held in Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972); cert.denied, 404 U.S. 866 (1971), that a supervisor could be held to account under §1983 for his "failure to train and supervise" a prison trusty. It was the prison trusty's negligence in the use of a shotgun which was the immediate cause of the plaintiff prisoner's injury. However, the Court held that the "superintendent" of the County Farm, who was responsible for supervising the trusty system, was properly subject to liability under §1983 in Roberts' action "based on negligence," supra, at 826.

Two Court of Appeals decisions subsequent to Roberts v. Williams, amplified this holding. Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972), concerned a civil rights action filed against several Chicago policemen in the beating of the plaintiff, Thomas Byrd, in the backroom of a local tavern. The District Court directed a verdict for the defendants which was reversed by the Seventh Circuit. In an opinion by Chief Judge Swygert, the court held that in addition to the liability of those who participated in the beating, a §1983 suit could be maintained against those supervisory and non-supervisory officers who negligently failed to protect the plaintiff. The Seventh Circuit stated the principle of tort liability for negligence by citation to a pertinent passage of a lower court opinion, as follows:

> Negligent liability generally arises in the context of affirmative action. The defendant is seemed culpable where he has acted and his acts do not conform to the standard of a reasonably prudent man as judged against the community ideal of reasonable behavior. See Prosser, Torts, §§ 53, 54 (3d ed. 1964). The defendant is not usually held to be responsible for inaction. However, where the defendant is under some affirmative duty to act and he fails to act accordingly, he may be held negligently responsible for his

> omission. He is responsible if his omission is unreasonable in light of the circumstances. Huey v. Barloga, 277 F.Supp. 864, 872 (N.D. Ill. 1967); see, Symkowski v. Miller, 294 F.Supp. 1214, 1217 (E.D. Wis. 1969). 466 F.2d at 10.

In the same year, a Police Chief of the City of Atlanta was held liable under Section 1983 for his negligent supervision. In Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972), as in this case, the defendant was sued "on the theory that Williams was negligent in failing to train properly the auxilliary officer, [and] to supervise his patrol duties..." The court, in a per curiam opinion, upheld the judgment in favor of the plaintiff. The judges emphasized that the case was "not one of vicarious liability founded on the theory of respondent superior, but is instead a claim founded upon the defendant's own negligence." Beverly v. Morris, supra at 1357.

Later cases have added further weight to this line of authority. The first was Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974). It, too, involved a police chief who was held to be accountable for negligent supervision. In Dewell, the plaintiff suffered a diabetic coma in the police lock-up, allegedly because the chief had "failed to establish procedures within the Oklahoma City Police Department whereby jail personnel of the said Department were

advised of missing persons listed in all points bulletins..." Had such procedures been in effect, the plaintiff alleged, the chief would have been aware that he was holding in his jail as a purported drunk a man who he was already informed was actually a diabetic suffering from a medical emergency. Circuit Judge Barrett reversed the lower court's dismissal of the §1983 action against the Chief of Police. The Court held that the District Court could not, as a matter of law, dismiss Dewell's §1983 claim that Lawson be held liable for being "negligent in not supervising his subordinates..." Dewell v. Lawson, supra, at 881.

Shortly thereafter, a decision was handed down in Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974); cert. denied, 419 U.S. 838 (1974), concerning, as the instant case does, the liability of a warden for the negligent supervision of his staff. In this case the warden was sued under §1983 for his negligent supervision of security operations at the Louisiana State Penetentiary. The plaintiff alleged that this negligence permitted a situation where another prisoner was able to make his way to Parker's bed and attack him with a dangerous weapon. The Circuit Court reversed the summary judgment which had been granted in favor of the warden. In doing so, they went so far as to hold that even an "isolated incident of a negligent failure" to act might under appropriate circumstances support a §1983 action against the warden.

The approach was most recently reaffirmed in the case of Sims v. Adams, 537 F.2d 829 (5th Cir. 1976). The case concerned the negligent failure of supervisory defendants including the Mayor and Chief of Police of Atlanta, to discipline a police officer who was known to be prone to violent acts. Citing Roberts v. Williams, supra, and Beverly v. Morris, supra, Judge Gee reversed the lower court's dismissal as to the liability of these defendants under §1983.

The District of Columbia Circuit took a similar approach in Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971); rev'd sub nom (on other grounds), District of Columbia v. Carter, 409 U.S. 418 (1973) which this Court has considered in another context. Although this Court chose not to address the issue of liability for negligence in the supervision of subordinates on certiorari, see, 409 U.S. at 420, n. 3, the District of Columbia Circuit Court had addressed the matter specifically on appeal.

> Even if Captain Prete or Chief Layton is protected by official immunity from suit at common law, they are both subject to suit under §1983 for any negligent breach of duty that may have caused appellant to be subjected to a deprivation of constitutional rights. Indeed, Mr. Justice Frankfurter maintained that §1983 was designed for precisely

such a case, i.e., the case in which the State shields a police officer from liability for conduct which would subject a private citizen to liability. While the Supreme Court has read into the statute immunity for legislators and judges, it has not read into the statute a broad common law immunity for all government officers exercising discretionary functions. In particular, various supervisory officers have been held subject to suit under §1983 for negligence in supervising their subordinates. 447 F.2d at 365 (footnotes omitted).

In short, the lower federal courts have consistently recognized that negligent conduct by state officers can give rise to a Section 1983 action, particularly where the risk of harm to constitutionally protected rights is widespread.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respecfully submitted,

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